SCOTLAND / JUDGMENT

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[1997] ScotCS 1 (2 September 1997) VOLUME 6 CHAPTER ELEVEN - QUANTIFICATION OF LOSS 11.1. General Any amounts that the pursuers would be entitled to claim under the indemnities, of course, will be affected by the extent of the enforceable liabilities they incurred to the victims and their families. There is little doubt in my view that the pursuers had liability to make some compensation. For reasons already set out OPCAL and the other Participants would have been found liable to make reparation under their statutory duties apart from other grounds of fault. This means in effect that as a result of the accident the pursuers were at the very least liable to pay damages at the Scottish levels of damages. The estimated Scottish damages which would have been payable to the employee of each of the defenders in the seven leading cases have been tabulated and are not disputed so that were Scottish levels of damages the measure of the pursuers' loss there would be no difficulty in computing any amounts payable under the indemnities. However the pursuers contend that they are entitled to recover the enhanced amounts actually paid out under the settlements. As I have already said this contention depends on the reasonableness of the settlements. It also of course depends on the construction of the indemnities. It of course has to be considered if the claimants would have settled for some lessor amounts than was actually paid to them and I have already expressed the view that had the claimants not been offered amounts in the region of those actually offered the claimants would have refused to settle and gone to American courts - probably those of Texas. Thus a critical question is whether or not Texan courts would have accepted jurisdiction in the actions proposed by the claimants. The levels of damages that would have been determined by a Texas court are of course also critical. It should be noted that it was not disputed even by the defenders' experts that the level of damages in Texas is generally higher than in Scotland. Thus even allowing for such questions as choice of law it would not be too difficult to find that the probability is that, if the claims had gone to a Texas jury, levels of damages to some degree higher than would have been awarded in Scotland would have been found due. However a more contentious issue is whether levels

of damages as high as the settlement amounts would have been obtained. That the pursuers were at serious risk of having to pay such damages is their contention. Of course if the position is that OPCAL and its Participants would have been subject to Texas jurisdiction particularly on the ground of special arrangements OPCAL had for the sale of its oil from Texas then because of the categorisation of the loss as "indirect" the indemnities would not be apt to cover enhanced values in any of the actions except the Andrew Carroll action. The question of the likely recovery by Andrew Carroll of enhanced values would still remain for determination in his case. Moreover my views on the prospects for the recovery of enhanced damages would be highly significant in the other cases if my views on indirect loss are not correct. 11.2. The Experts Both parties led expert evidence on the issues affecting the American court system . The pursuers' principal expert was Professor Russell Weintraub. He was aged 63 and held a chair in Civil Jurisprudence at Austin University, Texas. Professor Weintraub had been teaching law for 38 years. He holds degrees from New York University and from Harvard. He is qualified and experienced in Texas Law. His speciality is International Litigation. He has taught occasionally, by invitation, at a number of universities, including Oxford, Dublin, and Paris. Prior to the present proof he had never before appeared as a witness but he had appeared in a number of litigations arguing specific areas in which he was expert, or submitting documentary material. Some of these have been significant leading cases. He had often appeared for defendants in the special appearance procedure. He is also consulted extensively in litigations . He spends about 15-20 hours in court each month. He was involved by invitation in the drafting of the special Texas corrective Statute which deals with the forum non conveniens problem. Indeed the Statute followed upon an article written by Professor Weintraub. He is also the author of a leading textbook on Conflict of Laws that has run to three editions and which is often cited in the Texas Courts. He has written another book on Contract and has published many articles particularly in the fields of Conflicts of Laws and Choice of Laws. He has written on the due process question in relation to personal jurisdiction in state courts. He has given a short course of lectures at the Hague Academy of International Law. He has been awarded the Teaching Excellence award at the University of Houston. He is a member of the Texas State Bar Association and indeed assisted in the revision of the entire Commercial Code of that state. He is also a member of the American Law Institute and of the State Bars of New York, and Iowa. A further expert witness for the pursuers was Mrs Ruby Sondock. She was aged 67 and is presently a consultant with a firm of attorneys in Houston . Mrs Sondock sat as a judge in the Texas state court system for 17 years. She qualified in law with distinction in Houston, Texas in 1961 and for four years thereafter practised in her own firm dealing mainly with general civil litigation. She was appointed to the Family Bench in 1973 and by co-option to the Texas State Court in 1977. Thereafter she remained on the Court by election at four yearly intervals. About June 1982 she was elevated to the Texas Supreme Court and served on that court for two years but thereafter decided to return to the State Court. She was serving on the Supreme Court during the second hearing there of the Helicopteros case and she sided with the majority of the court. With regard to the Supreme Court some

judges , including Mrs Sondock , initially arrive there by appointment but then have to submit to election when the elections are due to be held and at the expiry of electoral intervals every six years thereafter. As a judge of first instance she had presided in many wrongful death or personal injury claims and clearly in that role has had great experience. She now acts mainly as a mediator in family matters. Mr Wayne Fisher was led by the pursuers to give the views of an experienced and practical Texas attorney. Mr Fisher was 55 years of age and is a partner in the Houston law firm of Fisher, Gallagher, and Lewis. In 1961 he graduated in law with distinction. Thereafter he practised for a period in Texas as an assistant in defence litigation in what he described as the world's biggest law firm. In 1966 he founded his own firm and since then has practised extensively in personal injuries litigation, particularly on the plaintiff's side. He is licensed to practice in the various levels of the Texas court system and also in the United States Supreme Court. In 1981 he was president of the Texas State Bar that encompasses about 45,000 lawyers and he has also been president of the Texas Trial Lawyers Association. In 1991 his University gave him an award as one of its five outstanding alumni of the year. He is the president of the International Academy of Trial Lawyers. He has written a number of articles including some on various topics of jurisdiction and settlement of claims. He personally has conducted between 100 to 150 Jury Trials and settled in excess of 1,000 cases. His own firm have had two jury verdicts with awards of $10,000,000 each. He has had substantial involvement with cases with an international connection including cases involving the North Sea. I was left in no doubt that Mr Fisher was highly respected in Texas for his abilities in his chosen fields of practice. The pursuers led Professor Hans Baade in replication. This arose because the defenders lodged productions on the question of Equal Treaty Rights at a relatively late stage of the proof. They were allowed by me to do this under reservation of the pursuers' right to lead further evidence on that matter. Professor Baade was 65 years old and is the Hugh Lamar Stone Professor of Civil Law at the University of Texas in Austin. He has held that post since 1975. He originally graduated in law at Kiel University in Germany and subsequently obtained law degrees in the United States. He also holds a diploma from the Academy of International Law at the Hague. He has pursued an academic career since 1960. He has extensive experience in the fields of International Law, Conflict of Laws, Comparative Law, and International Business Law. He is a member of the American Academy of Foreign law, the American Society of International Law, and the National Panel of Arbitrators. He has lectured by invitation at a number of other universities and has regularly acted as an expert witness, consultant or arbitrator in significant cases involving questions of Public or Private International Law. He has published extensively. He has developed a particular interest in Equal Treaty Rights. The defenders lead as an expert on Texas law, Thomas Baker Greene, an experienced attorney. He was 45 years of age and is a shareholder in Ware, Snow, Fogel, Jackson & Greene, attorneys in Houston, Texas. He had originally graduated in history and political science. He graduated in law with honours in 1975. He has been practising law since and as well as having considerable general experience of civil law he has practised extensively in personal injury and wrongful death cases. The emphasis of his litigation

practice has been defence work. His experience extends to federal law. He has acted extensively for insurance, oil, and transportation companies. He has personally conducted 60-70 Jury Trials of which about twenty led to a jury decision. He has also extensive experience of the operation of the discovery process. However his personal experience of trying wrongful death cases to a conclusion in the State Court system is relatively limited although he has participated in a number of such cases and also settled about twelve. He has tried a number of wrongful death cases in the federal system. He is a member of the Texas State Bar and holds specialist certificates in civil trial law and personal injury trial law. He is a member of the American Bar Association, the Houston Bar Association and the International Bar Association. He has argued several cases before the Texas Courts of Civil Appeals and has participated in preparing a brief for the U. S. Supreme Court. He had acted in many cases where a question of jurisdiction arose. He first became involved in the Piper Alpha case about September 1988. He accepted that Vinson & Elkins rate among the top law firms in Houston and that Mr Fisher is regarded as a formidable Plaintiff's attorney. He accepted that he had not acted in a case with a foreign defendant during the five years before his appearance in the witness box in the present case. He accepted that he had not advised any of the Contractors on the question of quantum of damages in the Texas system before 1993. Some of the views he gave in his evidence were first formulated and expressed sometime after the present case was under way. He had instructed the witness Dr Yeager but only after the pursuers' witness Dr Allen had given evidence. A further expert witness for the defenders was William Wayne Kilgarlin aged 62 and a former Justice of the Supreme Court of Texas. Mr Kilgarlin presently practises as an attorney in Texas. After graduating in science about 1954 he served for two years in the army and then graduated in law in 1962. From 1959 until 1960 he served as a member of the Texas State Legislature and was a member when the Texas Long-Arm legislation was passed. From 1962 until 1978 he practised in the Texas Courts mainly in the field of plaintiffs' personal injury law. He was involved during that period in more than 100 jury trials mainly as lead counsel. About 50% of these trials were personal injury or wrongful death cases. He was Democratic Party County Chairman for Harris County from 1962 until 1966. He was appointed a district judge in 1978 and accepts that his political affiliations would have entered into that appointment. As a district judge he would take about 40 jury trials a year. In 1980 he required to stand for election for a further four year term as a district judge and was returned unopposed. In 1980 he ran in primary elections to become the Democratic candidate for the Texas Supreme Court and was defeated. However the successful candidate died a few weeks thereafter. Mr Kilgarlin was appointed to replace him and was thereafter elected to the Supreme Court unopposed. He was elected for a six year term but when he offered himself for re-election in 1988 he was on this occasion defeated. When he was a district judge he always did well in the Polls of the Bar that are taken to rate the popularity of judges. When he lost his seat on the Texas Supreme Court he returned to practice as an assistant in a firm and although he handles some litigation work most of his present practice is in the field of property law. Since returning to private practice he has been involved in a group of three cases which raise a major jurisdictional

question and equal treaty rights points. He has been involved in a number of cases which raise international questions. He has taught various aspects of law at a number of Texas Universities, has taken seminars ,and has a number of publications to his name. In 1985 he received the Texas State Bar award for outstanding service to continuing legal education. In 1988 he received an award from an American Civil Liberties organisation as the outstanding Texas Jurist. He had formed no view on the jurisdiction questions affecting this case until he had heard the evidence of Mr Silva and Professor Weintraub and also had an opportunity to read the papers in the Busse case. He accepted that he had raised an equal treaty rights question with his clients before Professor Weintraub had begun his evidence . 11.3. Texas legal system 11.3.1. State and Federal In each American state (including Texas) the court system is broadly divided into Federal and State. Thus every state has Federal Courts which cover them. These have two kinds of jurisdiction. Firstly they have jurisdiction over what are properly Federal matters, including questions arising over Federal Statutes, constitutional issues, and Admiralty matters. Secondly the Federal Courts will take jurisdiction over state matters where the rules of diversity of citizenship apply. Thus for example if the plaintiff is Texan and the defendant belongs to another state diversity applies and the case can be removed to a Federal Court although the plaintiff has the initial preference as to which court the suit should be raised in. The objective of the diversity rule is to minimise the risk of bias. If both the litigants suing in Texas are foreign to Texas, diversity does not apply. Equally diversity would not apply if the initial defendant is outside Texas but a Texan defendant is conjoined as an additional party. Thus in the present case it was not disputed that the opportunities of defeating diversity are such that claimants against OPCAL would have had little difficulty in breaking diversity and retaining the cases in the State Court which would have been the court of their choice. The Federal Court derives its powers from the Federal Constitution and similarly the State Court derives its powers from the State Constitution. Judges in the Federal system are appointed whereas judges in the State system are elected and require to stand for periodic re-election. In the State system a judge may be appointed in the first instance if a vacancy occurs between elections. Texas is divided into 254 counties and under the State system each county has District Courts. Thus Harris County where Houston is situated has 60 District Courts and these are divided into four divisions, namely Civil, Criminal, Family and Juvenile. The first level of appeal from the District Courts is the Court of Appeals. There are 14 such courts in Texas and it is necessary to go to the Court of Appeals applicable to the particular District Court of first instance (although if the docquet of the appeal court is too crowded the appeal may be transferred to another court). Normally the Bench of the Court of Appeals consists of three justices but it may also sit en banc that is to say with nine justices. The next level of appeal in the State system is the Texas Supreme Court and in this court a full bench of nine justices would sit. The final appeal level is the United States Supreme Court that is available if the case has federal implications. The Federal Court system also has District Courts and for this purpose each state is divided into Federal Districts. Texas has four such districts. There are 8 Federal Courts in the district in which Houston is situated. There are 11 Federal Appellate Courts and the appeal

court that covers Texas is in New Orleans where the jurisdiction of the court also covers Louisiana. Again in the Federal system the final appeal is to the U. S Supreme Court. Each of the two court systems has its own distinct procedures. In the State District Court system the choice of venue is governed by provisions in the Texas Civil Practices and Remedies Code (the equivalent of the Rules of Court). The general rule is that law suits should be brought in the district where the cause of action accrues. Actions against corporations are to be brought in the district where the corporate body has its seat or has a representative. In relation to actions against foreign corporations these should be brought where the cause of action accrued or where the foreign corporation has a representative. Where the plaintiff has a venue right in a county against one of the defendants the Court can deal with the whole case at that venue. Thus in practice in an important litigation a plaintiff's attorney may conjoin an additional defendant to achieve what is thought to be a favourable venue for the litigation. The choice of venue can confer an important advantage under the Texas system since certain counties are reputed to be easier for certain categories of litigants - and in particular for plaintiff's suing personal injuries claims. Thus Mr Fisher said in evidence that if he had been acting for Piper Alpha claimants he would have favoured litigating in Harris County. I have little doubt that in practice and within limits Texas attorneys can manipulate the venue in which they raise their actions. 11.3.2. Jury System Under the State system nearly all factual issues are tried by a jury no matter how complicated such issues may be. In particular a plaintiff has an inherent right to have the case tried by a jury if this is insisted upon. Thus if the claimants in the present litigations had sued in Texas they would have had a right to have their cases tried before a jury. A jury may consist of 6 or 12 persons and the selection of the jury is often a complex process. In order to simplify issues for juries in difficult cases extensive use is made by counsel of models and graphics. A notable feature of the procedure is that the judge directs the jury before counsel make their final addresses to the jury. In directing the jury the judge will follow the prescribed Pattern Jury Instructions that set out succinct styles of directions for specific kinds of jury trial. Before the judge directs the jury the lawyers are given an opportunity to make recommendations as to the contents of the directions. 11.3.3. Special Appearance Under the State system if a defendant wants to take a preliminary objection in limine to the competency of the action on the grounds of lack of jurisdiction he does so by lodging a Special Appearance. If he fails to do this and simply appears this would be regarded as a General Appearance and thus a waiver of any right to object to jurisdiction. The Court has a fairly wide range of procedures available to it in deciding a Special Appearance. In some cases the matter may be decided solely on submissions but otherwise recourse can be had to documentary evidence and affidavits and in some cases oral evidence may be taken before a decision is made. In many cases Discovery of Documents is allowed as a preliminary step and this will often give a plaintiff an opportunity to improve the case for jurisdiction. The onus of rebutting jurisdiction rests on the defendant in the State system (although the Federal system differs in this respect). In Texas, particularly in a large or important case, the Discovery process will under the hands of able attorneys tend to be very extensive and exhaustive. Moreover a considerable

time may lapse before the Special Appearance is decided. Because plaintiff's lawyers in Texas tend to operate on a contingency fee basis and because in a major litigation the Special Appearance procedure may involve material outlay it requires attorneys to have considerable financial resources if they are to conduct a Special Appearance to best effect. If the judge eventually sustains the Special Appearance the case will be dismissed but if it is refused the case will proceed until a jury determination. Among Texas lawyers there is some difference of view as to whether it might in certain circumstances be competent to seek an immediate appeal against the refusal of a Special Appearance by use of the writ of mandamus procedure but in practice it would rarely if ever be possible to appeal until the end of the case. Thus in practice if the claimants had chosen to sue in Texas and OPCAL had wanted to challenge jurisdiction they would have been faced with a lengthy, difficult and expensive Special Appearance procedure. The onus of satisfying the judge of the merit of their case would have rested on them and they would have been at the mercy of the District Court Judge who sat in the venue chosen by the plaintiff. If the Special Appearance had failed they would have required to see the claims go to jury trial before an appeal on the jurisdiction question would have been available. 11.3.4. Appeals If at first instance a party wants to attack an award of damages he can seek a new trial or a re-valuation by the Court of the amount of damages to be awarded. The District Court judge can be asked to allow a new trial. In this event the judge may ask the plaintiff if he accepts remittitur failing which in an appropriate case a new trial will be allowed. The procedure for remittitur is governed by Rule 315 of the Texas Rules of Court but remittitur will only be permitted if the plaintiff agrees to it. The penalty for not accepting remittitur therefore can be the allowance of a new trial. If a new trial is allowed this as a practical matter is not appealable. The question for the judge will always be if there is enough evidence to support the jury award. The grant of a new trial is governed by Rule 320 and the judge has a wide discretion to allow a new trial on the whole or part of the damages on cause shown. At the end of the trial a right of appeal to the first appellate level is available but such an appeal would only be available at an earlier stage by way of mandamus and that only in exceptional circumstances. To proceed further to the Texas Supreme Court the leave of that court is required and this is decided by vote of the Justices. Such an appeal is initiated by a Writ of Error. The case must be appealed to the Court of Appeals before further appeal is competent. Appeal to the U. S. Supreme Court on a question with Federal implications requires the leave of that court. This would only be granted if the case raises a particularly important question. In practice for a defendant to proceed throughout the complete appeal procedure could take years and would be very expensive since a successful party does not recover expenses. 11.3.5. Contingency fees In Texas the legal fees payable by plaintiffs are generally based on the contingency fee system. This means that the attorneys acting for such plaintiffs only recover fees if the plaintiff is successful. The outlays required to pursue a claim for damages under the Texas system are considerable. Only law firms with substantial financial resources can afford the outlays and risks inherent in pursuing a significant litigation. If a smaller firm takes on a large claim it may not be able to pursue it effectively because of a lack of sufficient financial

back-up. Thus for example Mr Wayne Fisher deponed that his own firm has about $8 million invested in outstanding expenses. In damage claims the plaintiff's attorney may expect to be paid at least 30% / 40% of any damages recovered but a substantial proportion of this will be consumed by the outlays. Parties do not recover expenses from the losing side. Thus for a plaintiff successful in Texas to be as well-off as he would have been suing in Scotland it is necessary to recover damages about 30% more than Scottish levels to take account of the contingency fee deduction. For defendants in Texas it is very expensive to defend a substantial litigation since even if they are successful they have to meet considerable expense. 11.4. Jurisdiction 11.4.1. General As I have already indicated the circumstances under which a Texas court would have accepted jurisdiction had the claimants gone to Texas was a hotly contested issue between the parties. I was treated to a large volume of American law - particularly case law - on the issue. Generally the pursuers' experts took the view that there was a strong probability that the claimants had they gone to Texas would have succeeded in establishing jurisdiction. The defenders' experts while not totally discounting the risk thought that on balance it was unlikely that the Texas Courts would have entertained jurisdiction. There were at times suggestions in the evidence that some of the members of the consortium other than OPCAL would have been vulnerable to jurisdiction in Texas. Had jurisdiction been established against any such Participants then there was evidence that this would have founded jurisdiction against OPCAL as well on the basis of agency. However in the pursuers' pleadings the specific case of vulnerability to jurisdiction that is made is that OPCAL would have been vulnerable to Jurisdiction because of their trading contacts with Texas and in particular specific contracts they entered into involving Texas. The defenders' experts say that these contracts would not suffice to found jurisdiction particularly because of the decisions in Helicopteros and also Asahi (which cases I shall discuss later). The pursuers' experts dispute that these cases would be any bar to acceptance of jurisdiction. 11.4.2 The American Law and Cases The American Law I was referred to related to the circumstance under which a Texas court would accept jurisdiction against a defendant non-resident in the State. Professor Weintraub explained that if the non-resident has a known minimum contact with Texas out of which the causes of action has risen then jurisdiction would be acknowledged for that particular cause of action. That is to say specific jurisdiction would exist. On the other hand if one requires to sue for a matter that is unrelated to the contact on which jurisdiction is founded general jurisdiction has to be established. To found on general jurisdiction one has to establish continuous and systematic contacts with Texas so that it would be fair and reasonable to invoke Texas jurisdiction for any matter. The outer limits of state jurisdictional power is determined by the due process clause of the fourteenth Amendment of the United States Constitution. The significant words in that Amendment are to the effect that no-one should be deprived of life, liberty, or property without due process of law. This clause has been a prolific source of litigation in the United States since it sets a constitutional limit on State power. However Texas Courts will exercise jurisdiction to the limits of the Federal Constitution. The ultimate criteria for federal intervention are set by the United States Supreme Court but judgments on personal

jurisdiction questions are few and far between. There have only been fourteen since 1945. In chronological order the first case of the United States Supreme Court that deals with personal jurisdiction is Pennoyer v Nieff 95 U. S. 714 (1878). The case is merely of historic interest and adds nothing to my deliberations. A more pertinent case is International Shoe Co. v Washington 362 U. S. 310 (1945). This is considered the cornerstone of the American law on in personam jurisdiction. The Appellants were a Delaware corporation having their principal place of business in St. Louis, Missouri. They manufactured shoes and had places of business in other States but not in the Defendant State, Washington. Their merchandise was distributed widely to other States. Although they had no office or stock in Washington they employed 11 to 13 salesmen in the State. These salesmen resided in Washington and their activities were confined to that State. They were remunerated by commissions on their sales. The Appellants provided them with samples to show to prospective customers each sample consisting of one of a pair of shoes. The authority of the salesmen was limited to soliciting orders which were then transmitted to the Appellants' office in St. Louis from where if the order was accepted the contract was fulfilled. The salesmen had no authority to enter into contracts or to collect money. The dispute between the parties related to a claim by the State to recover certain unpaid employment contributions exigible under the law of the State. The relevant issue was whether the Appellants were amenable to suit at the instance of the State. It has to be noted that the case is a specific jurisdiction case since the contributions claimed by the State related to the alleged business contact with the State. The case represents a development from the historical position under which personal jurisdiction was based on de facto power over the defendant. As Mr Chief Justice Stone observes in the leading judgment, whatever the historical view, the law has now evolved to the extent that due process requires only that in order to subject a defendant to a judgment in personam , if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice". The Chief Justice is there equating due process with fair play and substantial justice. However the case has further significance for the present case because at page 317 the Chief Justice observes that it has been generally recognised that the casual presence of the corporate agent or even his conduct of single or isolated activities in a state on the corporation's behalf are generally not enough to subject it to suit on causes of action unconnected with the activities there. On the following page Chief Justice Stone, having reviewed certain authorities , proceeds "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from these activities". Thus in that passage we have clear recognition of the existence of a rule of general jurisdiction although as Professor Weintraub points out the observations of the court on the matter are obiter . Moreover it is perhaps interesting that the dichotomy is represented as being between "single or isolated activities" and something which is clearly more substantial. The Chief Justice also observes that the criteria by which the court will mark the boundary line which justifies the subjection of a

corporation to a suit and those which do not cannot be simply mechanical or quantitative. Rather the test depends on the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure. He then goes on to refer to a consideration sometimes referred to as "purposeful availment" namely that to the extent that a corporation enjoys the privilege of conducting activities within a state , it enjoys the benefits and protections of the laws of that state. This is an important observation because if gives guidance about a factor that is often mentioned in the authorities namely the enjoyment of the benefits and protections of the law of a state. If the corporation enjoys the privilege of conducting business activities within a state then it enjoys the benefits and protection of the law of that state. The Supreme Court held that there was jurisdiction against the Appellants. The next Supreme Court case, Benguet Perkins v Consolidated Mining Co. 342 U. S. 437 (1952) is highly significant because the Court there recognised that general jurisdiction had been established on the basis of circumstances unrelated to the relevant business contacts. Indeed the case is the first general jurisdiction case at the Supreme Court level. The facts were that a corporation owned and formerly operated gold and silver mines in the Philippine Islands. However during the Second World War due to the Japanese occupation of the Philippines the company carried on general administrative business in Ohio. Such business included directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc. While engaged in such activities in Ohio the president of the corporation was served with a summons in the Ohio State Court by a non-resident of Ohio. The cause of action did not arise in Ohio and bore no relationship to the corporation's activities there. It was held that the business done in Ohio was sufficiently substantial and of such a nature as to permit the courts of Ohio to entertain the action although the cause of action did not arise from activities in the State. Moreover acceptance of such jurisdiction did not offend against Due Process. The opinion of the Court was delivered by Mr Justice Burton. According to Professor Weintraub the case is also important because it establishes the materiality of contacts that are subsequent in date to the incident which gave rise to the action. Mr Kilgarlin on the other hand took the position that to allow events subsequent to the cause of action to affect jurisdiction was philosophically unsound because it would permit a corporation to mould its affairs so as to influence jurisdiction. Moreover he considered that the recitation of facts within the opinion was not itself to be regarded as part of the holding in the case. It is interesting that Mr Justice Burton declared that the amount and kind of activities needed to make it reasonable and just to make a corporation subject to the jurisdiction of a particular State must be determined in each case. Indeed it is notable in considering the authorities that decisions in various cases before and after Perkins are very much (as witnesses declare) "fact driven". It is also worth noting that in this case the corporation concerned carried on in Ohio what generally may be described as administrative activities. The substantial business of the company was mining but there was no suggestion that Ohio state had any connection with the mining because the mines were in the Philippine Islands which had been occupied by Japan. This is important because the defenders

sought to argue that it was a necessary implication that the contacts required to set up jurisdiction by a foreigner required the introduction of business into Texas such as would arise if goods were sold to Texas residents. The facts in Perkins do not appear to support this. The next Supreme Court case was McGee v International Life Insurance Co. 355 U. S 220 (1957). I do not require to review the facts of this case because it is clearly a specific jurisdiction case essentially resting on one insurance contract. However Mr Greene thought that the case was significant because it was observed in the opinion that California had a manifest interest in providing effective means of redress for its residents when insurers refuse to pay claims. It was suggested that no such interest rested in Texas in relation in an action by claimants against the consortium nor would any of the parties have been Texas residents. Moreover it was also said that in McGee "convenience" was specifically mentioned as a factor affecting the question of "fairness". It may be worth observing that in McGee the Supreme Court seems to have accepted the Appeal direct from the Court of Appeals of Texas without the intervention of the Supreme Court of Texas. It is perfectly clear from the later authorities that I shall examine that whatever meaning is to be given to the word "convenience" as used in this case it is certainly something different to the use of a similar expression in forum non conveniens. Hanson v Denckla 357 U. S. 235 (1958) is another specific jurisdiction case. The case establishes that the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. It is essential in each case that in respect of the defendant’s activities there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its laws. Thus it must not simply be fortuitous that the defendant finds itself in contact with the forum state. It must be by design. Professor Weintraub thought that the court in Denckla retreated a little from the expansive approach of McGee . Kulko v California Superior Court 436 U. S. 84 (1978) was a case concerning a child custody question. The parties both New York domiciliaries were married in California during a short stopover there. A son and daughter were born in New York while the parties were living together there. In 1972 the parties separated and the mother moved to California. Under the terms of a separation Agreement the children were to remain in New York with the father but to visit the mother during certain vacations. In 1973 by the parties’ consent the daughter began spending the school year with the mother in California visiting the father during vacations. Two years later the son without the father’s consent joined the mother in California. The mother then raised certain proceedings in the Californian Courts to obtain custody of both children and to advance certain child-support claims. It was held by the Supreme Court that the exercise of jurisdiction over the father in these circumstances would violate the Due Process Clause of the Fourteenth Amendment. The mere fact of sending the daughter to California to live with her mother connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State’s judicial jurisdiction over the defendant. A defendant to be bound by a judgment against him must have certain minimum contacts with the forum State such that the maintenance of the suit does not

offend against "traditional notions of fair play and substantial justice". Mr Justice Marshall observes at page 92 of the Report that like any standard that requires the determination of "reasonableness" the "minimum contacts" test of International Shoe is not susceptible of mechanical application but the facts of each case must be weighed to determine whether the necessary "affiliating circumstances" are present. Few answers will be written "in black and white". The greys are dominant and even among them the shades are innumerable". The next case of the U. S. Supreme Court is World-Wide Volkswagen Corp. v Woodson 444 U. S. 286 (1979). An Audi motor car had been purchased in New York. The family drove it on holiday to Arizona and on the way they had a motor accident in Oklahoma. They brought a products-liability action against the suppliers in Oklahoma. The suppliers did not do business in that State. They sold no goods or services there. Nor did they solicit customers in the State. The Supreme Court refused jurisdiction but there were three dissenting judgments. The Court held that there was a total absence of affiliating circumstances and the fact that the accident had occurred in Oklahoma was not in itself enough. The case gave rise to the important "stream of commerce" doctrine. At pages 297/298 in the opinion of the majority it was stated that the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. However although the said doctrine was referred to from time to time in the evidence and arguments before me the present pursuers' case does not really depend on it. Nevertheless the doctrine illustrates the considerations that will appeal to an American Court called upon to exercise jurisdiction. The defenders may have hoped to get some comfort from the suggestion of a requirement to deliver products into the forum state but this was within the context of a specific jurisdiction case involving product liability. There are suggestions in the case that might be thought useful. It was suggested that the defendants must have a reasonable expectation of being hauled into court in the forum market. Moreover in respect of Due Process the circumstances must be such as to make it reasonable to require the corporation to defend the particular suit that is brought there. A second factor is the plaintiff's interest in obtaining effective and convenient relief. The interest of the host state in the litigation is also a factor and the defenders repeatedly made the point that in respect of an accident in the North Sea only the United Kingdom had an effective interest in the regulatory implications of the accident. It is also worth noting that it was observed in the cases that the various factors affecting Due Process should not be looked at in isolation. It is also an authority for the view that a corporation can avoid jurisdiction by structuring its affairs to that end. In general the last point seems to be the law of Texas. However once again it must be remembered that the case was a product liability case. The next Supreme Court Case is Helicopteros Nacionales de Columbia S. A. v Hall 466 U. S. 408 (1988) and this is a significant case relied upon particularly by the defenders. The case involved claims against the helicopter company, by the relatives of four men killed when a helicopter crashed in the jungle of Peru. The deceased were working in Peru constructing a pipeline. The main contractors were based in Texas. The helicopter company (Helicol) had been

brought into the contract to provide necessary transportation for the workers. They had no office in Texas, maintained no agent there for the service of process, were not authorised to do business in Texas, performed no helicopter services there, nor did they recruit employees in Texas. The deceased were American citizens but not residents of Texas. However Helicol had negotiated their contract in Texas. They purchased substantially all its helicopter fleet in Texas. Thus they had effectively purchased all the tools of their trade in Texas but from one firm. They had done about $4 ,000, 000 of business in Texas as purchasers of equipment, parts, and services. This money was spent in regular amounts. They had sent pilots to Texas to pick up Helicopters and maintenance men were sent there to be trained. Indeed employees were maintained in Texas in connection with these contracts on a year-round basis. Payment of sums due to them from the contract were paid through a Texas bank and certain payments due by them were paid through Texas. Apart from the business relative to their purchase of helicopters Helicol had not previously done business in Texas. The case had a fairly protracted and chequered history. The accident had been in 1976 and the U. S. Supreme Court did not finally dispose of the case until 1984. When the plaintiffs raised their actions in Harris County Court, Texas, the defendants, Helicol, lodged Special Appearances. These were refused and a trial was heard which resulted in judgment for the plaintiff Hall. This lead to an appeal by Helicol to the Court of Civil Appeals which reversed the trial judge on the jurisdiction question and dismissed the actions on the ground of want of jurisdiction. At this stage the court was treating the case as a specific jurisdiction case under the Long-Arm Statute. On a further appeal to the Supreme Court of Texas the court at first rejected the appeal but then set aside its first judgment and after a further hearing in its final judgment allowed the appeal and acknowledged that the Texas court had jurisdiction. This decision is reported 638 S. W. 2d 870 (1982). The first judgment, later withdrawn, had been based on a majority of 6 to 3 and in the second appeal the majority was the same but of course in the opposite direction. In the leading judgment by Justice Wallace he refers to the three-prong test applied in terms of Article 2031b of the Texas constitutional code. Essentially the three prongs in that Code are (1) The nonresident defendant must purposefully do some act or consummate some transaction in the forum state, (2) the cause of action must arise from or be connected with such act or transaction and (3) the assumption of jurisdiction by the forum state must not offend against traditional notions of fair play and substantial justice; consideration being given to the quality, nature, and extent of the activity, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. Justice Wallace stated that the second prong was unnecessary when the nonresident defendant’s presence in the forum through numerous contacts is of such a nature that it satisfies the ultimate test of Due Process. Professor Weintraub suggested that in Justice Wallace’s view we can see how far the Texas courts will go in recognising general jurisdiction subject only to the Federal Supreme Court’s power to intervene on the federal constitutional issue of Due Process. The Texas Supreme Court had given recognition to the fact that Hall had been an American citizen although not resident in Texas. The only question in the U. S. Supreme Court was whether

the decision in the final State Court had consisted with Due Process and the view of the majority of the Court was that it did not. In the judgment of the Court Mr Justice Blackmun observed at page 416 that the Court must explore the nature of Helicol's contacts with the State of Texas to determine whether "they constitute the kind of continuous and systematic general business contacts the Court found to exist in Perkins". He also by reference to the case of Rosenberg (dated 1923 and therefore somewhat dated) said in relation to general jurisdiction "purchases and related trips standing alone are not sufficient" and this might suggest that Helicopteros was not to be confined to a single purchase. However the point made by the pursuers in relation to Helicopteros was that it referred to a single supplier and we do not know if the facts in Rosenberg although referring to "purchases" were applicable to more than one supplier. In any event the pursuers argued that even if Mr Justice Blackmun was intending to preclude purchases in general the facts of Helicopteros related to a single supplier so that anything extending beyond that was obiter. The parties' expert witnesses sought to read the effect of Helicopteros in different ways. Professor Weintraub clearly did not respect the decision in the case and considering that many eminent judges had disagreed with that decision, that in itself may be within his prerogative as an academic. However the defenders criticised the Professor for being so dismissive of a case that was a decision of the Supreme Court of the United States. For my part without forming any view as to the quality of the final decision in the case I must accept the case so far as it goes as representing the law of the United States. Professor Weintraub considered that the plaintiffs had erred in conceding that Helicopteros could not be a specific jurisdiction case. He thought that it would inevitably be arguable that the accident could be attributable to the purchase of the helicopters if they or their spare parts had contributed in any way to the accident. In his strong dissenting judgment Mr Justice Brennan also considered that there might have been a case of specific jurisdiction developed by the plaintiffs. Although he was in the minority Mr Justice Brennan has always been regarded as a judge of distinction so that the defenders' suggestion that it was extraordinary for Professor Weintraub to suggest that he could have won Helicopteros on specific jurisdiction loses some of its force. Indeed Mr Justice Brennan agrees with Professor Weintraub in other matters such as that it was curious for the Court to rely on an obsolescent case like Rosenberg . Given that the decision in the case was so close Professor Weintraub's general view that Helicopteros was not a very convincing case and might be distinguished does not seem merely an eccentric academic opinion as the defenders suggest. In any event he thought that the case had been regarded as a single supplier case and a supplier who need not have been used. The Court had placed emphasis on the fact that Helicol had no Texas shareholders whereas OPCAL had shareholders who were Texan. Mrs Sondock had been on the bench of the Texas Supreme Court at the time of the second judgment in Helicopteros . She testified that it was not regarded in Texas as changing the law on general jurisdiction. It was another fact-driven case. The majority of the Court were regarding the purchases of helicopters as essentially being one contract with one manufacturer. Mr Justice Brennan in his dissenting judgment had differed from the majority because he regarded the consequential contracts such as for training of pilots

as being distinct contacts. Moreover even Mr Greene agreed with the pursuers' experts to the extent that Helicopteros effectively expanded the jurisdiction of the Texas Courts in that the supremacy of the Texas Supreme Court to arrive at its own view of the Long-Arm Statute was acknowledged. He accepted that in the early 1980s the Texas Supreme Court had taken an expansive view of jurisdiction and opened the door to general jurisdiction. However Mr Greene and Mr Kilgarlin took a narrower view of Helicopteros in that they interpret it as meaning that general jurisdiction will only satisfy Due Process if the contacts with Texas relied upon are of the same essential kind as those in Perkins namely involving a situation where the nonresident company has really moved significant parts of its administration to Texas. However it was accepted that "of the same kind" does not necessarily mean "the same". They accepted that it would be too extreme an interpretation of Helicopteros to require that all the essential management of the corporation must be located in Texas. They did not agree that Helicopteros should be regarded simply as a single source of supply case and indeed thought that it was the most important cases in the defenders' favour. Mr Kilgarlin pointed out that the holding in Helicopteros made no reference to a single source of supply. Helicopteros and Perkins are the only two cases in the US Supreme Court that are specific to general jurisdiction. This may suggest that cases on state jurisdiction are not readily accepted for hearing before the US Supreme Court. This was contended by the pursuers' experts. The defenders sought to draw a distinction between contacts that had the effect of putting something into Texas as compared with contacts that merely involved taking something out of it. I was not very clear how valid a distinction this was if it applies at all. If for example OPCAL was selling their oil in Texas they may have been providing employment there and paying agency fees into Texas. The test of purposeful availment of the rights and privileges of Texas law to me seems a more pertinent test. Burger King Corporation v Rudzewicz 471 U. S. 462 (1985) was a case which involved a dispute between the plaintiffs (who carried on their business in Florida) and a franchise holder who was a Michigan resident. A question arose about a purported termination of the franchise and the plaintiffs raised proceedings in Florida. The case therefore involved a question of specific jurisdiction. The U. S. Supreme Court reversed a finding of the lower Court that to accord jurisdiction would offend against Due Process. At page 471 of the Report Mr Justice Brennan delivering the opinion of the Court said that "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations". He further states that the constitutional touchstone remains whether a defendant purposefully establishes "minimum contacts" with the forum State. A defendant will not be hailed into a jurisdiction because of random, fortuitous or attenuated contacts but jurisdiction is proper where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum State. Where a defendant has engaged in significant activities within State he manifestly has availed himself of the privilege of conducting business there and because his activities are shielded by the "benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well. He

too thought that a corporation could structure its affairs successfully to avoid jurisdiction. There is reference in the case to purposefully directing your activities at residents of the forum state but this is hardly surprising where the defendants' business was to run restaurants. Once it has been established that the defendant has purposefully established minimum contacts with the forum State it is necessary to look to see if the assertion of personal jurisdiction accords with "fair play and substantial justice" Thus Mr Justice Brennan prescribes a two stage process. As factors to be taken into account in the evaluation of this he lists (for use in appropriate cases) the burden on the defendant, the forum State's interest in adjudicating the dispute ,the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. The fact that there is a choice of law clause adopting Florida law is a factor to be considered but does not mean that every litigation has to be brought in the courts of Florida. All the considerations mentioned in the Opinion are of course being applied to a case of specific jurisdiction but it was argued for the pursuers that there is no reason why the underlying principles should not have equal application to a general jurisdiction case. It is also worth noting that Mr Justice Brennan summarises the position about Due Process by observing "the foreseeability that is critical to Due Process analysis is that the defendants' conduct and connection with the forum state are such that they could reasonably anticipate being hauled into court there." Mr Justice Brennan also observes that where the defendant deliberately engages in significant activities or creates continuing obligations between himself and the residents of the forum then he manifestly availed himself of the privilege of conducting business there. It should be noted that creating obligations with the residents of the forum state is only one of the options. To succeed under Due Process is said to require a compelling case. Another significant U. S Supreme Court case is Asahi Metal Industry Co. v Superior Court 480 U. S. 102 (1987). This case dealt with the significance of the Due Process test and was heavily relied upon by the defenders. The case arose out of an accident in California when a motor cycle collided with a tractor. The motor cyclist was injured and his wife and a passenger were killed. The case was raised in the Californian court and was a product-liability suit. It was claimed that the tube and valve assembly of the tyre of the motor cycle were defective and had caused the accident. The plaintiffs sued the Taiwanese manufacturers of the tube, namely Cheng Sin, and these settled with them. Asahi had manufactured the valve assemblies and then sold them to Cheng Sin knowing that they would be used to assemble tyres, a proportion of which would be sold in California. Cheng Sin sued Asahi under the terms of an indemnity. The Californian Supreme Court held that the facts were sufficient to support State jurisdiction on the view that the valves had been sold by Asahi to Cheng Sin knowing that they would be delivered into the stream of commerce in California. However this judgment was reversed by the U. S. Supreme Court. In giving an Opinion, which in its conclusion on the Appeal was the opinion of the Court, Justice O'Connor indicated her view that it was not enough that it should be foreseeable that goods will enter the stream of commerce of the forum State. There must be an act

purposefully directed towards that State. The case also failed the Due Process test. Asahi did not itself do business in California. Nor did it have any employees, agents, nor any office in California. It did not solicit business there. The State of California had limited interest in the dispute. Although the case is one where jurisdiction was ultimately refused it was in some respect an extreme case where the essential dispute was between two Asian companies neither of whom had any natural interest to litigate in California. The case was also a specific jurisdiction case. It should perhaps be noted that a number of Justices seemed to accept that the circumstances satisfied the minimum contacts test but joined with the majority in holding that the case failed the "fairness" test. The defenders' submission was that the case shows how in a case like the present Due Process could present an insuperable obstacle to a claimant seeking to have the Texas Court accept jurisdiction. They submitted that the case had raised the Due Process consideration to become the equivalent of forum non conveniens . Professor Weintraub's view was that in a general jurisdiction case "fairness" considerations were likely to be less acute because the prerequisite contacts were not a single contact but must consist of a number of contacts to offer the foundation for general jurisdiction. The defenders' expert Mr Greene in particular relied heavily on Asahi . He thought that the fact a defendant had to travel to litigate in the forum State and then had to submit the dispute to a foreign jurisdiction were regarded as important factors in the case. Moreover not only did the plaintiffs have no substantial interest in having their case decided in Texas but Texas itself had no serious interest in the matter whether by the way of effect on social policy or otherwise. However Professor Weintraub argued that this case is very different to the kind of situation encountered in Asahi. Just to take an example Texas is not only a major producer of oil with many oil platforms of its own but it regularly sends people to work on or service the oil industry in Scotland. As the Professor pointed out in relation to the inconvenience point in the present case, before the fire had even been extinguished Vinson & Elkins in Texas were already handling the case on behalf the Occidental interest. It must be remembered that Mr Greene had far less experience than Professor Weintraub in dealing with jurisdiction points in Court. Ahasi was in my view an example of applying a selection of forum clause to a specific jurisdiction case arising out of the contract. In addition to the United States Supreme Court decisions I was referred to a considerable number of Texas State Court decisions. One of the more interesting of these was Schlobohm v Schapiro 784 S. W. 2d 355 (1990). This was a decision of the Supreme Court of Texas and it was relied on heavily by the pursuers as a case on general jurisdiction. The trial judge had sustained a motion for dismissal on a Special Appearance and the Court of Appeals had sustained this. However these views were reversed by the Supreme Court of Texas. The action was brought by Lessors against a nonresident of Texas in respect of a corporate Lessee's non payment of rent. Schapiro was a Pennsylvanian doctor. His son resided in Dallas and set up a dry cleaning business called Hangers Inc. Dr Schapiro invested $ 10 ,000 in this business and received stock in the company. He became the sole director and his son became the president. Dr Schapiro conducted certain company meetings and he kept records of the company with his accountant in Pittsburgh. He guaranteed some leases of

property in Texas and he loaned the company further sums of money to buy equipment. Indeed he regularly covered Hanger's expenses and eventually his expenditure totalled $474,000. He often visited Dallas and he sent his accountant there to look into Hangers' affairs. Hangers eventually stopped paying rent on a building and this gave rise to the claim against Dr Schapiro. The case was regarded by the Court as a general jurisdiction case because Dr Schapiro had not directly involved himself in the Lease. Justice Cook in the Opinion of the Court indicated that for a Texas court to exercise jurisdiction over a nonresident two conditions must be satisfied. Firstly the Texas Long-Arm Statute must authorise the exercise of jurisdiction. This Statute authorises the Texas Courts to accord jurisdiction if the nonresident is "doing business" in Texas. Secondly the exercise of jurisdiction must be consistent with Federal and State constitutional guarantees of Due Process. Justice Cook observes that the view of the Court is that the broad language of the Long-Arm Statute in relation to "doing business" allows the Statute to reach as far as the Federal Constitution permits. That last comment was regarded by the pursuers' expert witnesses as being an indication of the expansive view of jurisdiction taken by the highest State Court at the time although the defenders' expert Mr Greene did not see the case in this way. Justice Cook proceeds to examine the federal tests for jurisdiction and observes that where the defendant's activities in the forum are continuing and systematic jurisdiction may be proper without a relationship between the defendant's particular act and the cause of action. In other words the Supreme Court of Texas clearly confirms after Helicopteros that general jurisdiction is available against a nonresident and that in many cases this will be quite consistent with Due Process. In fact the point is made that in general jurisdiction failure on Due Process is less likely because essentially there will be a number on contacts. However it is emphasised that Due Process remains a separate issue. The pursuers used Schlobohm as an demonstration of the fact that a Texas Court would not construe Helicopteros as laying down that general jurisdiction requires a situation equivalent to that in the Perkins case. Mr Greene on the other hand suggests that Schlobohm though not identical is the same kind of case as Perkins since the nonresident in each case exercised effective control of a defendant in the forum State. However the value of the comparison is rather limited. In Perkins the nonresident corporation permitted itself to be controlled from Ohio. In Schlobohm Dr Schapiro was the relevant nonresident defendant and although he exercised some control over Hangers that company's connection with Texas does not seem to have been in dispute. Dr Schapiro was held to have done business in Texas but for the most part he personally was not controlling directly there. Professor Weintraub also regarded the case as confirming that contacts after the matter giving rise to litigation will be taken into account. One important point that was repeated in this case is that in deciding a question of jurisdiction on particular facts it is not appropriate to apply any tests mechanically. Mr Justice Cook indicated that he found it difficult to believe that anyone in Shapiro's position could have been surprised by a call to litigation in Texas. That represents another useful way of looking at the matter of general jurisdiction. Another case that was cited to me was Myers v Emery 697 S. W. Reporter 2d Series 26 (Texas Appeals, 5th District 1985). It was observed

in that case that "The question presented in Helicopteros was whether Helicon contacts with the State of Texas constituted the kind of continuous and systematic general business contacts that existed in Perkins ". The defenders argued that this case supports their view of Helicopteros and to a degree it does. Mr Greene thought that Helicopteros recognised Perkins as a benchmark in relation to general jurisdiction. However in Schlobohm the Court seems to have thought that in general jurisdiction "purposeful availment" was the touchstone. Design Information Systems v Feith Systems & Software Inc . 801 S. W. 2d. 569 (1991) is a relatively recent Texas case which certainly takes an expansive view of jurisdiction but is only at the Court of Appeals level of decision. An out-of-State supplier of computer software was sued in Texas by a purchaser on the basis that the product was not satisfactory. It was held reversing the Trial Judge that the suppliers repeated sales to Texas customers (numbering twenty-five in all) constituted the "continuous and systematic contacts" required to impose jurisdiction. It should be noted that the supplier had no office or employees in Texas and did not engage in any advertising or sales effort specifically directed towards customers in Texas. The decision went to the Supreme Court of Texas 13 S. W. 2d 481 and according to Professor Weintraub the matter did not even result in argument before the Supreme Court so that it can be taken that the decision was effectively affirmed. Professor Weintraub was not cross-examined on that point. The question of Due Process was argued before the Court of Appeals and rejected as a ground for refusing jurisdiction in the case. The Court seemed to treat the case as a general jurisdiction case (and this was certainly Professor Weintraub's view) but I have some sympathy with Mr Greene's opinion that despite the apparent approach of the Justices essentially the issue is specific jurisdiction. Mr Kilgarlin disposes of the embarrassment to his point of view by describing the decision as an aberration but be that as it may the case is certainly a cogent illustration of the expansive view of jurisdiction that can be taken by a Texas Court. It may be difficult to see the present case as being other than a fortiori of Design Information Systems . Another Texas case is Lujan v Sun Exploration & Production Co . 798 S. W. 2d. 828 (1990). In that case a widow of a deceased employee brought a wrongful death action against an employer providing contract oil field services. Once again the Trial Judge sustained a Special Appearance but the Texas Court of Appeals reversed him and held that the plaintiff had established jurisdiction passing both the test of complying with the Long-Arm Statute and that of Due Process. An attempt was made to appeal to the Supreme Court of Texas but that court refused Writ of Error. That means that the court were not satisfied that the judgment of the lower court was in every respect correct but that not withstanding there had not been an error sufficiently important to Texas jurisprudence to justify intervention by the court. The deceased in this case was employed by a New Mexico company and resided in that State. In 1987 he was killed at work in New Mexico as a result of an explosion. He was performing work under a contract between his employers and Sun Exploration, a Delaware company that had offices in Texas. His employers had made several business contacts in Texas. In addition they had sent their employees into Texas to obtain supplies and occasionally to perform work with Texas based companies. They advertised in Texas. The Texas Court of Appeals held that

these activities clearly constituted "doing business" in Texas thus satisfying the requirements of the Long-Arm Statute. The Court also held that the Due Process requirement had not been violated and that acceptance of jurisdiction by Texas would not offend against fair play and substantial justice. The case differs in its essentials from the present case in that it was clearly a factor that influenced the majority of the court that the contract between the employers and Sun provided that litigation concerning the contract should be in the Texas Courts. However what is of particular interest to the case is that in the leading Opinion Justice Whittingham discusses the effect of Helicopteros in relation to general jurisdiction. He states the requirement for general jurisdiction to be a showing of "substantial activities in the forum State" and indeed it is Schlobohm that is cited as authority for this. Thus stated the test would seem to be more general than a requirement for a Perkins type situation. In any event the Opinion makes it plain that the decision in the appeal is based on a holding that general jurisdiction has been established and the material facts in the case fall far short of Perkins . The case is not entirely satisfactory nor conclusive but it does show that at a high level Texas courts have been inclined to take a broad view of their right to exercise jurisdiction over nonresidents. Another modern Texas case is Temperature Systems Inc . v Bill Pepper Inc . 854 S. W. 2d 699 (1993). The Pepper company were an executive search and recruiting agency with their principal place of business in Texas. Temperature Systems Inc. were a Wisconsin company and distributed heating, ventilation, and air conditioning equipment manufactured by a firm called Carrier (which has no factory in Texas). Temperature Systems does not solicit nor advertise in Texas and it has no employees or agents there. However it maintained an inter-distributor relationship with other Carrier distributors across the United States including Texas. It purchases certain equipment from Carrier and between August 1988 and June 1990 it purchased to the amount of $45 ,000 from Carrier distributors in Texas and also purchased $450, 000 worth of HVAC equipment from other Texas residents over a similar period. Temperature Systems employed Pepper to search for sales executives it required and a dispute about commission arose which resulted in Pepper suing Temperature Systems in Texas. The commission question concerned a prospective employee called Ross who was a Wisconsin resident. A Special Appearance lodged by Temperature Systems was overruled and a trial resulted in which Pepper succeeded. The defendants appealed to the Texas Court of Appeals. Originally only specific jurisdiction was argued but general jurisdiction was argued at the Appeal. As the Court pointed out Temperature Systems had the burden of negating the facts that form the basis of Pepper’s general jurisdiction claim. This in itself perhaps emphasises the readiness of State Courts in Texas to assume jurisdiction. It is perhaps significant that although the contract sued under was in 1989 contacts with Texas were looked at until 1990. The Court found that Temperature System’s purchases of goods from Texas and the distributor relationship with Texas Carrier distributors were continuous and systematic contacts of a substantial kind sufficient to meet the second prong of the Texas jurisdictional tests which I have earlier mentioned . The Court observed that "there is no evidence that T. S. I.’s purchases from Texas residents and distributor relationship will cease". This would suggest that the Court is looking at the

jurisdictional facts as at the date of the litigation and not merely at the date of the original contract. In relation to the Due Process question the Court cites the following factors: (1) the burden on the defendant (2) the interests of the forum state in adjudicating the dispute (3) the plaintiff's interest in obtaining convenient and effective relief (4) the interstate's judicial system's interest in obtaining the most effective resolution of controversies and (5) the shared interest of the several states in furthering fundamental substantive social policies. The Court found that there was no violation of the principles of Due Process in allowing jurisdiction but one matter they took into account was the fact that Texas had an interest in defending its resident Pepper in respect of their allegation that the contract had been breached. That factor would of course not have been available to the claimants in the present cases generally but may have demanded consideration in the Busse case if the other claimants had been able to attach their cases to that case. Mr Greene thought that an important factor in the intermediate court's decision was that the defendants had made regular sales into Texas over a 15 year period although if that is so it is perhaps odd that the Court does not make reference to it in its Opinion. Basically, however, Mr Greene's view is that the decision is wrong. He thought that the case contradicts the ruling in Helicopteros . However the validity of that opinion rather depends on how Helicopteros is read. Pepper was decided after Helicopteros . If a broad view of Helicopteros is taken it decided that mere purchases are not sufficient contacts. In Pepper there were somewhat more than purchases and the Texas Court was obviously prepared to take a broad view. Mr Kilgarlin for his part considered that Pepper ought to be regarded as a specific jurisdiction case. However this opinion sits uncomfortably with the express declaration of the Court that it discounted specific jurisdiction. Apparently the case was further appealed and settled. It may be that Professor Weintraub erred in relation to this case since he thought that the Court relies exclusively on purchases from Texas whereas in fact there was also a distributors' agreement that the Court took account of. Mr Greene on the other hand thought that the case turned only on the distributors' agreement. A case produced by the defenders at a relatively late stage (and after Professor Weintraub finished his evidence) was Luker v Luker 776 S. W. 2d 624 (1989). This case involved a Louisiana resident who was involved in a motor accident in Louisiana. The motorist was a former resident of Texas and retained a Texan driving licence. She travelled to Texas three or four times a year. The plaintiff sought to invoke Texas jurisdiction and the case came before the Texas Court of Appeals. The argument was that since the defendant had driven with the benefit of a Texas driver's licences she had sought to avail herself of the protection and benefits of the forum State. This argument was rejected by the Court of Appeals. The Court also held that looking to the purchase and financing of an automobile in Texas it could not be said following Helicopteros that this amounted to continuing and systematic contacts with the State. Clearly compared with some of the cases considered above the case for general jurisdiction in Luker is relatively weak. Another case where jurisdiction was refused was Van Pelt v Best Workover Inc. 798 S. W.2d 14. Again in this case the Texas Court of Appeals refused to accord jurisdiction. The plaintiff was a Texas resident who brought an action against his employers for injuries received while working in an oil rig of the coast of

Louisiana. The employers were also based in Louisiana and an attempt was made to found jurisdiction against them on the basis that they had a telephone listing in Houston, they bought some supplies in Texas and they mailed wage cheques to Texas. The Court referred to Helicopteros and considered that the contacts relied upon by Van Pelt were much weaker. Certainly the last two cases show that the State Courts in Texas will not allow carte blanche jurisdiction but the decisions depend very much on their facts and the commercial contacts with Texas may well be said to be substantially less significant than in the OPCAL cases . Scott v Huey L. Cheramie Inc. 833 S. W. 2d 240 (1992) was another case produced by the defenders after Professor Weintraub had given his evidence and was also a case where the Texas Court of Appeals held on appeal that the plaintiffs had not established jurisdiction in Texas. The plaintiff raised an action for damages for personal injuries against a Louisiana company in respect of an accident which had occurred in Louisiana or international waters. The Court held that Cheramie did not do business in Texas within the meaning of the Long-Arm Statute on the date of the alleged injury. It was observed that Cheramie did not contract with a Texas resident until thirteen months after the accident. Thus in this case the Intermediate Court appears to be taking the view that jurisdiction must be measured at the date of the critical event. This is not altogether easy to reconcile with Temperature Systems or more significantly with Perkins . Indeed it is not clear from the Report that Perkins was cited to the Court. On the other hand, as the Court of Appeals held, the business contacts were weak. Cheramie did not recruit Texas residents for employment. They made relatively unimportant purchases in Texas and also made crew changes and barge deliveries there. That was all. These activities were held not to amount to purposeful availment of the benefits of the Texas forum. Thus failing the necessary minimum contacts it was held that jurisdiction had not been established. Nevertheless the case illustrates that in Texas the acceptance of jurisdiction cannot be taken for granted in a marginal case. It may also illustrate that since the late 1980s the Court's readiness to allow jurisdiction against nonresidents may have hardened. The next case which the defenders asked me to consider was McFee v Chevron International Oil Co. Inc . 753 S. W. 2d 469 (1988). In this case the Texas Court of Appeals again affirmed the upholding of a Special Appearance that had dismissed the suit on the grounds of no jurisdiction. This is another case that was lodged by the defenders and not put to Professor Weintraub. The case concerned a British citizen who while working for Seiscom Delta, a subcontractor of Chevron Oil Company of Sudan was killed by rebels in Sudan. Although the parent company of Chevron Oil Company of Sudan was a Californian corporation and other Chevron subsidiaries were based in Texas the company was not itself authorised to do business in Texas. In 1976 Chevron Oil Company of Sudan had entered into a contract with United Geophysical Corporation to perform certain seismic exploration services. This contract was negotiated outside Texas. In 1981 United Geophysical Corporation was purchased by Seiscom Delta. There was no doubt that certain Chevron subsidiaries did substantial business in Texas and Group activities were carried out there. Chevron Oil Company of Sudan is a Delaware Company and has its principal offices in Sudan. However certain elements of the contract between Chevron Oil Company of Sudan and Seiscom

Delta were performed in Houston, Texas. Seiscom Delta received certain logistic support there and purchased supplies and management services necessary to carry out its contract. Indeed Seiscom's management decisions were generally made in Houston. The reasoning of the Court in its Opinion seems largely concerned with considering the alter ego doctrine in relation to a parent company and its subsidiaries. It was also noted that when Chevron Oil Company of Sudan contracted with United Geophysical Corporation, a Californian corporation, they had no reason to anticipate that the company would be taken over by Seiscom. Thus there was no apparent intent to do business in Texas. It was said that in that situation the assumption of jurisdiction by Texas would offend against "traditional notions of fair play and substantial justice" In any event the case is a specific jurisdiction case. In relation to a point I shall deal with later it may be noteworthy that although the deceased was a British subject no point about Equal Treaty Rights was taken. In his Report Professor Weintraub had said that cases of the Texas Supreme Court on Specific Jurisdiction were an indication of the Courts' readiness to take jurisdiction against foreign corporations. This opinion I may say does not appear to have been challenged by the defenders in cross-examination. Siskind v Villa Foundation for Education Inc. 642 S. W. 2d. 434 (1982) was said to be one such case. This was a specific jurisdiction case before the Supreme Court of Texas. A school in Arizona was sued in Texas by a Texan parent. The school solicited business in Texas by advertising there. Siskind a Texan resident attracted by the advertisements telephoned the school and papers were sent to him that resulted in his signing the enrolment application in Texas. He deleted a provision that said that Arizona was to be the exclusive forum. The cause of action was clearly one which arose out of the contract with the school. It was held that advertising in Texas was a sufficiently purposeful act to admit specific jurisdiction. Nor did the fact that Villa would have to litigate in Texas offend against fair play or substantial justice. In the leading judgment Justice McGee approved a dictum to the effect that "a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings". A case referred to by Mr Kilgarlin but which had not been put to Professor Weintraub was Middleton v Kawasaki Steel Corporation 687 S. W. 2d 42 (1985). This was a specific jurisdiction products liability case. The case was decided in the Texas Court of Appeals which reversed the trial judge's dismissal of the case and held that there were sufficient grounds to justify the exercise of jurisdiction. Kawasaki were a Japanese company and a claim was pursued against them in Texas arising out of the supply of an allegedly defective pipe casing. They conducted market research and sales promotion activities in Texas as well as maintaining an office there . It was held by the Texas Court of Appeals that Kawasaki had sufficient minimum contacts with Texas at the time the cause of action arose to subject them to Texas jurisdiction. The trial judge's allowance of the Special Appearance was reversed. Mr Kilgarlin used this case as authority for the view that activities in Texas after the cause of action arose were not relevant. However it has to be noted that Kawasaki is essentially a specific jurisdiction case and in such cases the ground of jurisdiction is closely related to the contact out of which a cause of action arises. As the Court mentioned in the Opinion the critical period for determining amenability to process in Texas was the

time when allegedly the defective pipe was sold and failed. It was agreed in the case that the analysis of the reach of Texas Courts extends to the permissible limits of due process. It is also noteworthy that the Court observed that Houston is the centre of the oil business in the United States. The Supreme Court of Texas refused to allow appeal. Keen v Ashot Ashkelon Ltd. 748 S. W. 2d 91 (1988) is another products liability case this time ultimately being decided by the Supreme Court of Texas. It was decided that an Israeli trailer manufacturer which delivered its product into the stream of commerce with the reasonable expectation that the product would enter Texas was amenable to the jurisdiction of Texas Courts for the purposes of the products liability claim. Thus we again have a specific jurisdiction case. The majority of the Court held that "a defendant's delivery of its product into the stream of commerce with the expectation that the product will enter the forum state will ordinarily satisfy the due process requirement of minimum contacts so as to afford that state personal jurisdiction over the defendant". In fact in the case it is difficult to understand the reference to a "stream" of commerce since there was only one transaction. In fact the case illustrates acceptance of the Court of a broad view of jurisdiction. Certainly that was how Professor Weintraub viewed the case. The majority judges also say that the case is distinguishable from the case of Asahi Metal because in Asahi it was testified that the Asahi company had never contemplated that their limited sales to Taiwan would result in exposure to Californian jurisdiction. Moreover Ahasi had never sold direct into Texas as had Ashot Ashkelon. Mr Greene was inclined to the view that Keen was a bad decision because the fairness factor was not argued. Mr Kilgarlin on the other hand considered that jurisdiction was only a side issue in the case and that the case had really been concerned with contributory negligence. I was referred by parties to some federal court cases. One important difference in federal procedure is that the onus of establishing jurisdiction rests on the plaintiff. Kervin v Red River Ski Area Inc . 711 Fed. Supp. 1383 (1989) was decided by a federal judge in the United States District Court relating to Texas. The plaintiff, a Texas resident, slipped and fell on a stairway at a ski resort in New Mexico. It was alleged that Red River had been negligent. Red River contested jurisdiction arguing that they had no property in Texas, were not licensed to do business there and had no contacts with travel agents in Texas. However they had inserted one advertisement in one magazine whose general circulation would have been available in Texas and indeed there were other advertisement contacts. They also had engaged in local advertising within Texas. Four out of their five shareholders resided in Texas and they recruited ski instructors from universities in Texas. The company had originally been incorporated in Texas but was later re-incorporated in New Mexico. They mailed promotional brochures to Texas residents who applied for them and in fact about half of their customers were Texans. The Court laid stress on the fact that in specific jurisdiction cases even one contact may support jurisdiction. The judge goes on to observe that in general jurisdiction cases "a greater level of contacts with forum state is required and the contacts must be continuous and systematic". Helicopteros and Perkins are cited but it is perhaps noteworthy that the judge does not attempt to relate the requirements to the kind of overall administrative arrangements which were present in Perkins (as the defenders suggest may be required).

Indeed the test I have referred to receives a degree of refinement for it is observed that a defendant must have contacts with the forum state "quantitatively and qualitatively great enough to warrant the significant conclusion that it has constructively consented to defending a suit in Texas". The observations on Helicopteros are interesting and show that the Professor's view has some support for it is stated that the Court in Helicopteros collapsed the defendants' Fort Worth activities basically into one contact, "a package of goods and services purchased". In the case before him the judge held that Red River had laid down a pattern of engaging in in-state advertising which even on its own might be regarded as continuous and systematic contact. Reference was then made to the defendants' other contacts with Texas which I have already mentioned. In declaring that his decision to accord general jurisdiction was consistent with Perkins the judge observed that Perkins had clarified that a nonresident need only conduct a limited portion of its business in the forum state for general jurisdiction to exist. The Court also considered the Due Process requirement and held it to be satisfied. One consideration in this respect was said to be the benefit Red River derives from Texas residents. I should also note that the Court held that in relation to the sufficiency of contacts the fact that Red River had Texas shareholders is a factor. The pursuers stressed that OPCAL were wholly owned by a Texas company. Mr Greene thought that the case could be explained by the fact that New Mexico is contiguous to Texas and that therefore substantial business connection with Texas could be expected. Certainly as Mr Kilgarlin claimed the case only has the authority of a single judge but he delivers what would appear to be a carefully reasoned judgment and in my view the case at least illustrates the struggle the defendants might have had had the claimants pursued in Texas whatever the ultimate outcome may have been. A federal case that was lodged by the defenders after Professor Weintraub gave his evidence was Holt Oil and Gas Corporation v Harvey 801 F. 2d 773 (5th Cir. 1986. The case was decided in the federal 5th Circuit Court of Appeals. A Texas Oil and Gas Company brought an action against Harvey, an Oklahoma resident. The court of first instance had refused to entertain the case because of lack of jurisdiction. An interesting point is that in Harvey's contract with the plaintiffs there was a choice of law clause selecting Oklahoma law. Nevertheless the appeal court found that general jurisdiction in Texas was established. Harvey had attended college and been employed in Texas. He owned a condominium in Houston. He travelled to Texas regularly for recreation and to visit his children. He had extensive business dealings with a Texas company other than Holt. He was the sole shareholder of Marlin Oil Company that had drilled oilwells in Texas. The Court held that for purposes of general jurisdiction the correct approach was not to consider Harvey's contacts individually but to examine them in toto . It was held that the exercise of jurisdiction did not offend against traditional notions of fair play. This was said by the defenders to illustrate that notions of fair play have to be regarded even in general jurisdiction case. A case that the defenders particularly relied on was Bearry v Beech Aircraft Corporation 818 F. 2d. 370 (5th cir. 1987). The litigation was a products liability claim arising out of an aircraft accident. The United States District Court held that jurisdiction had been established. However in the federal system an Interlocutory judgment can be appealed

and the Federal Court of Appeals reversed the judge of first instance. The case represented an attempt to invoke general jurisdiction using stream of commerce considerations. A Louisiana resident bought a Beech aircraft. This crashed while in Mississippi. Beech were a Delaware company with a principal place of business in Kansas. Beech had no business contacts nor agents in Texas. However they had for some years run a national marketing campaign and a substantial volume of business had been done with seventeen independent Texas dealers. Beech manufactured aircraft frame assembles for Bell Helicopters of Fort Worth, Texas to the value of about $72 million. Beech representatives visited Texas dealers to help with maintenance problems. Beech purchased over $195 millions worth of goods from over 500 Texas vendors. However none of the plaintiffs resided in Texas and it was considered because the interest of Texas in the litigation was so slight it would be unfair were he suit to proceed in Texas. The Court expressly disagreed with the view of the judge of first instance that stream of commerce considerations applied to general jurisdiction. General jurisdiction was said to be based on the concept of implied consent to Texas jurisdiction. Beech had carefully structured their affairs so as to shield themselves from Texas jurisdiction. It was noted that the fact that Beech products flow into Texas does not create a general presence in the state because Beech carefully completed transactions outside Texas. The law of Texas neither protected nor benefited Beech. It was particularly noted that Beech had no office nor agents in Texas. Of course the case being a federal case was one where the burden of establishing jurisdiction rested on the plaintiffs. Professor Weintraub thought that Bearry was a good example of why Texas lawyers try to stay out of federal courts (it was I think clear that the Piper Alpha cases would not have required to be raised in the federal courts). Professor Weintraub pointed out that the Sixth Circuit Federal Court did not appear to agree with the view expressed in Bearry (the Fifth Circuit) that a party could by mere structuring of its affairs avoid being held accountable to Texas if the reality was that there were significant contacts (Roethlisberger v Tokyo Aircraft Instrument Company of Japan 1991 W. L. 347671). Mr Greene places considerable emphasis on Bearry . He points out that the case shows that the activities of related companies in the same group of companies are irrelevant. He considers that Helicopteros is interpreted as deciding that the business contacts necessary to establish general jurisdiction must be "general business" contacts. However I was not cited any state court case where the concept of "general business" was held to be a prerequisite of general jurisdiction. However Bearry is a case where the dealings of the defendants with Texas were very substantial in value, albeit extremely guarded, and it illustrates the fact that, at least in the federal system, the securing of Texas jurisdiction cannot be taken for granted. One important difference from the present case is of course that it was clear that Beech had no agents in Texas. A federal case of first instance was Psarianos v Standard Marine Ltd Inc . 728 F. Supp. 2D 438 (l989). Crew members and survivors of deceased crew brought reparation proceedings in Texas against the owner of a vessel which sunk off the coast of Japan. The crew were Greek. The American Bureau of Shipping were also defendants on the basis that they had failed to survey the ship and in fact Mr Greene acted for them so he was personally familiar with the case. It was alleged

that ships connected with the defendants had called at Texas ports almost on a daily basis. These regular visits continued after the accident so that this again was a case where post-incident activities were said to support general jurisdiction. Jurisdiction was held to be established. This is consistent with what is stated in Professor Weintraub's book on jurisdiction that is a standard reference work. In that book Professor Weintraub states that when "doing business" is used as a generally-affiliating basis for jurisdiction (in a cause of action not arising from the business activities in the forum) jurisdiction must be exercised while the defendant is still doing business in the forum and doing it in a manner that makes it reasonable to use his continued activity there as a generally-affiliating basis for jurisdiction. Due Process was also held to have been satisfied. The defenders argue that the case was not to be taken as an authority that the presence of agents within the forum state is a sufficient ground of jurisdiction. A relatively recent case that was cited to me was Bissbort v Wright Printing & Publishing Co . 801 SWR. 2d. 388 (1990). The plaintiff sued Wright for the cost of repairing a printing press. Wright were in Iowa and Bissbort in Texas. Jurisdiction was held established by the Court of Appeals but largely on the circumstance that Wright had paid a large sum through a Texas bank. The Court considered that by wiring money to a Texas bank Wright had taken advantage of the protection against misappropriation of the money afforded by Texas law. However it has to be noted that the case was a specific jurisdiction case and that in any event the Court has not always taken the view that payment of money through a Texas bank is a sufficient contact to give rise to jurisdiction. Apart from illustrating the continuing readiness of at least some Texas Courts to take a liberal view of the requirements needed to establish jurisdiction I doubt if the case is particularly important. Guardian Royal Exchange Assurance Ltd v English Chinese Clays Plc . 815 S. W. 2d 223 (1991) was a case where according to Professor Weintraub the Asahi view of Due Process had been conclusive against the allowance of jurisdiction. It was a specific jurisdiction case but although minimum contacts had been established it was held that it would be unfair to allow jurisdiction. The decision was that of the Supreme Court of Texas. Throughout the history of the case there had been a certain amount of division of judicial opinion. English China Clay were an English company with certain Texas subsidiaries. Guardian Royal were their insurers and this insurance covered subsidiaries. However the acts relating to effecting the insurance had all occurred in England and no indication had been given that subsidiaries were in Texas. The employee of a Texas subsidiary of the English China Clay company was killed and the Texas claimants were paid off. The Court held that whereas "foreseeability" is an important consideration in deciding whether a nonresident purposefully established "minimum contacts" with the forum state so that personal jurisdiction could be exercised over a defendant without offending Due Process foreseeablity was not necessarily determinative. The Court also held that where general jurisdiction is asserted over a nonresident defendant the minimum contacts analysis is more demanding and requires the showing of substantial activities in the forum state. The Court went on to consider in detail the considerations that may affect the Due Process requirement. These considerations include the procedural and substantive policies of other nations whose

interests are affected, the burden placed on a defendant who requires to defend in a foreign legal system, the regulatory interests of the forum state (and though these in their own are not a sufficient basis for acceptance of jurisdiction where these interests are present they may justify a lesser showing of minimum contacts than would otherwise be the case), the plaintiff's interests in obtaining effective relief, the interstate system's interest in obtaining the most efficient resolution of controversies, and the interests of the several states in obtaining the furtherance of fundamental social policies. These are really a repetition of the Asahi tests. However it is to be noted that in Schlobohm it was suggested that once the contacts for general jurisdiction are established the connection with Texas is so obvious that one is moving towards a situation where it would not be unfair to litigate in Texas. This was recognised at page 231 of the Report where Justice Hightower observes "that only in rare cases, however, will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state". In Guardian Royal Exchange it was held that the assertion of personal jurisdiction over the defendants would not be consistent with fair play and substantial justice. The dispute was between English insurers and American insurers in respect of contribution to wrongful death suits which had been settled and the Texas interest in adjudicating the dispute was diminished since neither insurers were Texas insurers or insured. Thus in Guardian Royal Exchange as in Asahi the real claimants had dropped out of the case and the dispute was between parties with truly minimal interests in Texas. Moreover both were in fact specific jurisdiction cases. However what the case clearly shows is the two stage process where you look first at the matter of minimum contacts and if that test is satisfied you then look at the Due Process considerations. Of course this case was not decided at the time OPCAL were negotiating their settlement. 3-D Electric Company Inc v Barnett Construction Company 704 S. W. 2d 135 (1986) was another case cited by the defenders but not put to Professor Weintraub. It was a decision of the Texas Court of Appeals. A Texas electrical contractor brought an action against a Tennessee general contractor arising out of construction work done on a motel in Colorado. The action was arising out of the contract between the two parties so that the claim to jurisdiction was based on specific jurisdiction but the claim failed. There was an alter ego argument advanced by the plaintiffs that failed but in relation to minimum contacts it was observed that payments into a Texas bank were not a sufficient basis for jurisdiction. This finding seems to be inconsistent with Bissbort . Another case cited to me was Product Promotions Inc. v Cousteau 495 F. 2d. 483 (1974). Although the decision of the Court was overruled on another issue dicta that were not challenged by the United States Court of Appeals were to the effect that the activities of an agent within the forum state can provide the basis for jurisdiction against the principal. The case on jurisdiction in fact failed because the authority of the agent to act was not established. Indeed Professor Weintraub indicated quite categorically that acts by an agent in the foreign jurisdiction are equivalent to actions of the principal and I did not understand him to have been challenged on this. A workman called Billy E Cobb was injured on Piper Alpha platform in the North Sea in 1979 and raised a personal injuries action in Texas.

There were a number of defendants including OBI and OPCAL. The case was taken on appeal from a decision of the Court of first instance granting Special Appearance and OPCAL were successful in having the case against them dismissed on the ground of no jurisdiction. The case then went to trial against the defendants who remained in the case but in effect failed at trial. This resulted in the appeal to the Texas Court of Appeals. In the appeal no theory of general jurisdiction seems to have been advanced by the plaintiffs nor considered so that in effect the case was decided as a special jurisdiction case. It also has to be noticed that at the relevant date OPCAL neither employed Cobb nor operated the platform. The judgment dismissing the case against OPCAL and OBI was affirmed. The Court ordered that the judgment should not be published which is the practice when a judgment is not considered as important or persuasive. It would appear that only one significant contract with Texas involving OPCAL was presented to the court which of course would have ruled out general jurisdiction. Both Mr Silva and Professor Weintraub did not think that Cobb had any serious bearing on the position in the cases before me and I am inclined to accept that their arguments on this point are persuasive. Cobb was an individual personal injury case. I can accept that the litigations arising out of a multiple disaster such as Piper Alpha would have attracted much more skill and commitment to success than was the case in Cobb. There were clearly many significant contacts that would have been presented to a Court in these claims which were not considered at all in Cobb. The complicated arrangements involving Occidental Crude Sales Inc (which I shall detail later) are just one important example. Moreover the treatment by the Court of the questions raised in Cobb does not suggest the level of analysis encountered in other more significant cases. In particular general jurisdiction is not really dealt with. The Court themselves seemed to have been surprised that the plaintiffs had not raised alter ego issues. This may of course reflect the significance accorded to the case by the attorneys who were acting. Another case that the defenders founded on was British Malaysia Assurance v El Paso Reyco 830 SW Reporter 2d series 919 (Texas, 1992). The plaintiffs were Texan residents and their action was against foreign re-insurers. It was held by the Supreme Court of Texas that sufficient minimum contacts had not been established. 11.4.8. Minimum Contacts In the light of the law as discussed in the previous section an issue of critical importance in relation to the prospects enjoyed by the claimants of establishing jurisdiction against OPCAL in Texas is whether or not OPCAL had sufficient minimum contacts with that state and in particular whether the contacts which had occurred satisfied the requirement of being continuous and systematic to the degree demanded by the case law governing jurisdiction. The parties' experts were in direct conflict on this issue, Professor Weintraub, Mr Silva and Mrs Sondock taking the view that the established contacts with Texas would have sufficed for the purposes of jurisdiction whereas Mr Kilgarlin and Mr Greene took the opposite view. The pursuers argued that not only would the minimum contact rules have been satisfied but that there was no reasonable prospect of the consortium attacking jurisdiction successfully on the basis that for the Court to accord it would offend against Due Process. The pursuers in particular founded on the view expressed by Professor Weintraub that Asahi was a special

jurisdiction case and was particular to its own facts. The pursuers contended (and there was no dispute about this) that in entering into contracts in relation to Piper Alpha, OBI were the predecessors of OPCAL. Evidence about the contracts relating to Texas entered into by OPCAL (and their predecessors) was given by the Pursuers' witness John James Arnton. Mr Arnton is a solicitor employed with Elf Enterprises (Caledonia) Ltd. and the factual evidence he gave about contracts (as distinct from any inferences he drew from it) was not seriously challenged. Indeed the details of relevant contracts were agreed by Joint Minutes. Since 1985 Mr Arnton has worked in the oil industry. He joined OPCAL in 1987 and thereafter worked in their Law and Contracts department. After the accident he was asked by Paull & Williamsons to look through OPCAL's contracts with a view to identifying and producing those with a possible Texan connection Mr Arnton deponed that prior to the accident OPCAL had entered into purchase orders and service contracts with Texas companies relative to their North Sea operations. He explained that under OPCAL's practice purchases that were off the shelf, such as items of equipment, were entered into by way of purchase order. The purchase orders were on standard forms. On the other hand a large purchase that required special arrangements such as construction work would not be effected by way of purchase order but would be the subject of an individual contract. Between January 1984 and 6 July 1988 OPCAL entered into 140 purchase orders with 27 Texas companies and these contracts are set out in the pleadings. Most of these were for the purchase of goods but some were for the repair of equipment. Purchase orders were effected at regular intervals throughout the said period. Details of purchase orders are set out in the said Joint Minutes. The values of such purchase orders are considerable. They have a total value of $1,660,927. They have clauses to the effect that they shall be governed, construed and interpreted according to English or Scottish Law and in addition the parties agree to submit to the jurisdiction of the courts of the legal system governing the order to the exclusion of any other legal system. Many are follow-up orders to an original supplier. They all relate to the technical aspects of North Sea operations. Moreover most relate to materials that require to be specially fabricated by a specialist supplier. Indeed sometimes the supplier is a sole source supplier. In my view it is quite clear that at the time of the said purchases in many cases it was necessary to go to Texas to acquire particular supplies required by OPCAL and the consortium. For example Texas was one of the three major computer capitals in the world particularly in relation to the oil industry and the consortium acquired computer products and services from there. Other suppliers were also chosen because of their particular expertise. Moreover purchase orders with Texas companies continued to be entered into even after the disaster. Between 25 July 1988 and 3 May 1990 19 such purchase orders were effected with a total value of $182,459. In addition to the purchase orders the consortium (through OPCAL) also entered into a number of individual contracts with Texas companies. These too are set out in the pleadings and their details are the subject of agreement by Joint Minute. Between 1973 and 1986 16 contracts of this type were entered into with 11 different Texas companies. In 1973 OBI entered into a contract with Oceanic Contractors Ltd. for the design, fabrication, construction and installation of the Piper Alpha platform Oceanic, Contractors were a Panamanian

company with its offices in Beirut but the contract provided that any controversies were to be settled by arbitration in Texas (or such other place as the parties might agree) although Californian law was to be applicable. The rights and obligations of OBI were of course subsequently assumed by OPCAL. The said contract provided that the obligations thereunder were to survive the termination of the contract. Thus if a design fault were to emerge sometime after the contract any resultant dispute would be arbitrated in Texas. In April 1974 OBI entered into a contract with Brown & Root Offshore N. V. to build a pipeline from Piper Field to Flotta. The constructing company were a Netherlands Antilles company. It was provided that payment under the contract was to be made in dollars to a Texas bank. Again it was provided that obligations under the contract were expected to continue because the contract contained provision for the keeping of records and auditing after the works had been completed. The law applicable to the contract was stipulated as being Californian Law but there was a provision that if arbitration was required and parties could not agree to an arbiter then application for an appointment could be made to the Chief Justice of the District Court of Texas, Houston Division. The value of the contract was in excess of $1,500,000. The constructing company were part of the Brown & Root group of companies that is centred in Texas. Indeed Brown & Root Inc, the Texas parent company, guaranteed the performance by their contracting subsidiary of the obligations under the said contract. OBI negotiated the contract in Houston and employed as their attorneys the predecessors of Vinson & Elkins. On 25 October 1976 OBI (which as was correct was stated to be a Californian company) entered into a contract with a Texas company, Sedco Inc. This was for the provision of the manpower and services necessary to operate a drilling rig in the North Sea and the contract was stated to be worth $5,000,000 to $12,000,000. The rates payable by OBI are expressed in dollars and are to be paid to a Texas bank. In relation to this contract any arbitration is to be in New York. In this contract OPCAL are specifically mentioned as having an interest in the contract (they were at the time the operators of the Claymore platform). They are indemnified as one of the declared Participants against certain losses. As with the other contracts I have mentioned the contract is said to be binding upon the successors and assigns of the parties to the contract. In this case the contract is said to be governed by the law of England. Thus we have a Californian company contracting with a Texan Company for a contract to be performed in Scotland which is to be regulated by the law of England (although to be arbitrated in New York). This I think emphasises the complex international quality of the relevant contracts. On 26 May 1977 OBI entered into a contract with Aquatic International Corporation based in Houston, Texas. On this occasion OBI were described as having an Aberdeen office. This contract related to the supply of equipment and skilled labour for pipe handling work in the North Sea. As in the case of others of these contracts there are provisions for obligations that would survive the completion of the main work, in this case a confidentiality clause. Once again OPCAL have the specific benefit of an indemnity clause. The effective duration of the work to be carried out under the contract is four and a half years. The law to be applied to the contract is stated to be English law and any arbitration required is to be in England. This contract was signed shortly after Piper Alpha

came into stream about January 1977 so that it was envisaged that the contract would be performed to a substantial degree after Piper Alpha was in full operation. The next relevant contract was for professional services and consultation regarding pipeline construction and submarine maintenance and was entered into between OBI and International Oilfield Consultants Inc. of Texas. In this contract OBI are described as London company. The contract is dated September 1977. Again there are a number of clauses that would continue to operate after the work contracted for has been completed. English law is prescribed as the operative law. There were arrangements for the inspection of work at Hydrotech, Houston. Rates of pay are given in dollars. Moreover Texan specialists were recruited in connection with the work. Payment by OBI was to be made into a Texas account. The next contract to be noticed is a contract between OBI and Southeastern Drilling Inc. (a Texas company) dated 7 August 1978. The contract was to affix a jacket to the seabed at the Piper field. OPCAL were specified as Participants. Payment was to be made to the contractors at a Dallas bank. There were contractual obligations prescribed to survive the termination of the contract and some aspects were to be performed in Texas. The contract was to be governed by English law. The total sums to be paid in US dollars were $419,000. The next contract was entered into by OPCAL itself (which is therein described as incorporated in England) and it was with Southeastern Drilling Inc. It was for the provision for the supply of personnel in connection with the Piper Alpha support vessel Tharos. It was dated 28 June 1979. The contract not only provides for the application of English law but also provides for submission to the jurisdiction of the English Courts. Payment is to be in dollars at a specified Texas bank. The next relevant contract is between OPCAL and Sedco Inc of Texas. It is for the construction by Sedco of MSV Tharos. The governing law is English law and the contractor waives any immunity to legal process in England. The contractor reserves a right of pre-emption in respect of the vessel. Payment is to be in Texas in dollars. There was a five year labour agreement to take effect after construction of the vessel itself. The contractors had an obligation to maintain records and to permit inspection and audit of them which in practicable terms would have meant implementation of such conditions in Texas. The contract involved OPCAL in obligations of about $43,000,000. There followed a Mobilisation Agreement between Sedco Inc. of Texas and OPCAL and this provided for the delivery by the former of the new MSV Tharos from Japan. Payment is once more to be in dollars at a Texas bank. The total cost of this contract is estimated at $682,045. Even after Piper Alpha and its equipment had been supplied, installed, and was operating. OPCAL or its predecessors OBI, continued to enter into major contracts with Texas companies particularly with a view to securing consultancy, computing or other specialist engineering services related to the oil industry. These contracts were entered into at regular intervals right up to the accident in 1988. The individual contracts contained provisions similar to those contain in the contracts already detailed. Including the contracts I have detailed 16 major contracts and 3 sub-contracts were entered into with 11 different Texas companies. Seven of the contracts were entered into in the name of OBI, and OPCAL had these assigned to them. Nine contracts and three sub-contracts were

entered into directly by OPCAL. The value of all the contracts in total exceeded $ 100,000,000 and the contracts in which OPCAL were directly parties had a value in excess of $60, 000,000. All the contracts provide for payment to the contractors in dollars and seven specifically provide for payment to be made at a Texas bank. All the contracts have survivorship clauses that would lend meaning to any assignations of the contracts to OPCAL. Whereas much of the work to be performed under these contracts involved performance in Scotland certain of the work was to be performed in Texas. The two earliest contracts involved arbitration arrangements in Texas but the subsequent contracts were to be regulated by English or Scots law and some provided for choice of forum in England or Scotland. Some of the contracts provided for continuing or long-term relationships and indeed a contract entered into with Dixiline could have been fully operative until October 1989. Some of the contracts were with sole-source Texas suppliers and others required continuing business contacts for repair and spare parts. There is little doubt that OBI (and thus in effect OPCAL) relied heavily on Texas experience and expertise to have Piper Alpha and its ancillary equipment built and installed and that once the platform was operational the consortium still required to avail themselves of Texan expertise. Houston was generally recognised (at least in the period before 1988) as being the "oil capital" of the world so that it is perhaps not surprising that a company in the industry should have a significant business connection with Texas. In the post-accident period between the accident and the settlement OPCAL carried out a significant amount of business with Texas companies. Many of these involved Purchase Orders and the details of the relevant contracts are set out in the pursuers' pleadings and are agreed by Joint Minute. Nine such Purchase Orders were entered into after the accident in 1988 (seven were in 1989 and one in 1990). The total value of these particular Purchase Orders was in excess of $182,000. Seven of them pre-dated the agreement on an outline settlement in November 1988. They involved thirteen different Texas companies. It was argued by the pursuers that these contracts are relevant to the jurisdiction issue as showing a continuation of the preceding "stream of commerce" between OPCAL and Texas. Moreover after the accident OPCAL entered into nine Service Orders with Texas companies and these were directly related to the accident. These too are in the Pursuers' pleadings and agreed. Five of them pre-date 22 November 1988. A Service Order is a self-standing Order. There is little doubt that many of these contracts were motivated by the need to go to Texas to get access to the special expertise required to deal with the effects of the accident. A rather well publicised illustration of this was the employment of Red Adair (a Texan) who was called in by the personal intervention of the President of the parent Occidental Company because of his special experience in capping oil-related fires. That particular employment was negotiated on a verbal basis. The contracts had a substantial total value and the sums payable by OPCAL were to be computed and paid in dollars. One of these contracts involving Macgrange Inc of Texas was to be governed by the federal maritime law in respect of services or equipment purchased or to be used offshore or in navigable waters but otherwise by the law of the state of Texas. That contract was worth $110,000. Some of the contracts involve work time spent in Texas. Mr Arnton confirmed the rather

obvious view that after the accident OPCAL continued to do business with Texas because expertise was required that was not available anywhere else. This was consistent with the pursuers' contention that over the years the consortium resorted to Texas not on a fortuitous basis but because Texas had oil industry resources that were not at the time available elsewhere. Professor Weintraub thought that the post-accident contracts were relevant to demonstrate OPCAL's relationship with Texas. They were a continuing part of the stream of commerce with Texas. However Mr Kilgarlin and Mr Greene insisted that the post-accident contracts were not relevant. A fact upon which the pursuers and their experts placed considerable reliance in relation to the Texas jurisdiction question was that OPCAL sold all the crude oil produced through their North Sea operations through Houston, Texas. These sales were said to have been effected and brokered through another Occidental subsidiary company, namely Occidental Crude Sales Inc. (hereinafter referred to as OCSI). The transactions between OPCAL and OCSI were said to have been a significant - indeed critical - minimum contact which OPCAL had with Texas. OCSI although registered in California were licensed to do business in Texas and the operations they conducted for OPCAL were carried out in the office of OCSI in Houston which was their principal place of business. Houston was a world centre for oil sales and most major oil producers had an office or agent in Houston. Houston was of course a convenient base for oil sales to the Western hemisphere. However because of time change it was necessary, so that oil sales could continue on a 24 hour basis, that there should be a centre to conduct sales in the Eastern hemisphere and many companies used London or Rotterdam for this purpose. To facilitate sales through London, OCSI on 1 February 1972 entered into an Agreement with Occidental International Oil Inc. (hereinafter referred to as OIOI). In terms of that Agreement OIOI were to provide services to OCSI in the marketing of oil. OIOI had their principal office in London although they were in fact a Californian company. OPCAL required to sell at least part of their production of crude oil through Houston and if OCSI had not brokered their oil there they would have needed some other arrangement. There was a sharp issue between the parties as to the exact relationship of OCSI to OPCAL and the precise nature of the transactions which occurred involving them. Evidence in this connection was given by the pursuers' witnesses Michael Fitzgerald, James Endacott, and Robert Wood, whereas the defenders led Terry Glasgow. The sales of OPCAL's production of crude oil represented a considerable volume of business. During years of high production such sales were attaining fourteen hundred million dollars per annum and even in 1988 sales were in the region of eight hundred million dollars. Mr Fitzgerald is a chartered accountant and is presently the Executive Vice-President of OIOI in London. He was involved with OPCAL from 1974 until 1990 (when OPCAL was absorbed into the Elf interest) apart from about two years beginning in 1985 when he was involved with Occidental Group's operations on Libya. From time to time he held positions as a director with a number of other Occidental Group companies. Until he went to Libya in 1985 he held the position of Vice -President of Finance of OPCAL and he was also a Vice-President of OIOI. He was also a director of OPCAL for a number of years. He seemed to me to be well placed to be familiar with the general business procedures of OPCAL in the

period prior to the accident. In fact I thought that he was a good witness. He had not given a deposition in the Busse case which meant that he had not compromised his evidence as other witnesses had done to a degree by inconsistencies between what was said in those depositions and in Court. The witness Endacott is presently the Vice-President and General Counsel of OCSI and lives in Houston where OCSI have their principal place of business. He has degrees in Petroleum Engineering and Law. He began to work for the Occidental Group in 1966 and has continued working for various companies of that Group apart from the period from 1973 until 1981. He began doing legal work for OCSI in 1985. The witness Wood is presently the President of OCSI based in Houston and has held that position since 1975. He joined the Occidental Group in 1972. When he gave his evidence he was aged 60 and he had been engaged in the buying and selling of crude oil for thirty years. In OCSI he was responsible for co-ordinating the marketing and selling of all the Occidental companies' non-US produced crude oil and equity crude (that is to say crude oil not produced by the company but purchased in the third party market) and indeed in 1986 the domestic oil was also put under OCSI. The defenders' witness Mr Glasgow is a Texas resident and is presently a Vice-President of OCSI. He began working for that company in 1976. His job was scheduling oil shipments. In 1979 he became Manager of Crude Oil Trading and kept that position for six years before becoming a Vice-President of the company. While working for OCSI as a marketer he spent about six months in London. According to Mr Wood OCSI did not actually own the oil it sold on behalf of various Occidental companies including OPCAL. I think that this is obviously correct. It charged the company for which it was acting what he described as a commission. This may not be quite accurate because the sums passing from OPCAL to OCSI were computed as a proportion of the office costs that OCSI incurred through acting for OPCAL. The advantage in all sales of crude oil being conducted by OCSI was that this system enabled Occidental sales throughout the world to be part of an overall sales policy. OPCAL itself had no sales expertise within its own staff resources. OIOI had an office in London and were involved in helping OCSI to effect sales in the Western hemisphere. The staff of OIOI who were allocated this activity were hired and fired by and reported to Mr Woods. The practical effect of the arrangement between OPCAL and OCSI was that the former would inform OCSI that it had oil for sale at a particular time. When OCSI informed OPCAL that it had a customer, (which generally was done through OIOI's office in London), if OPCAL approved of the proposed sale it would be concluded by OCSI on behalf of OPCAL. Mr Wood described how in February 1972 OCSI entered into an Agreement with OIOI in terms of which the latter company were to provide to the former certain services, particularly of a technical, accounting, professional and marketing nature. The terms of this Agreement were before me. The agreement would have covered and did in practice cover the sale of crude oil from London by OIOI on behalf of OCSI. However it has to be noted that the Agreement itself had a term " No agency relationship is hereby created or shall be deemed to have been created and OIOI shall not under any circumstances have any authority to execute or conclude, directly or indirectly, any commercial transactions in the name of and on behalf of OCSI". The Agreement also provides that OCSI shall pay to OIOI in

consideration for the services under the Agreement "compensation" equal to 5% of the expenses incurred by OIOI for rendering the services. What in fact happened was that OIOI passed on to OCSI a proportion of its operating costs. Thus OCSI were billed by OIOI. When OCSI paid OIOI they would later recover such outlay from OPCAL. The Agreement was in effect until after 1988. Mr Wood stressed the fact that decisions on oil sales were in fact made in Houston although the producing company had to give its formal agreement before an effective sale could be made. He informed OIOI each day of the range of prices within which they could sell the Flotta crude. He explained that OCSI also regularly carried out on behalf of OPCAL speculative transactions in relation to crude oil such as Brent oil purchased from third parties. These dealings often involved very large sums of money. Various contracts entered into by telex were produced in terms of which OCSI sold oil purportedly on behalf of OPCAL and these emanated from OCSI in Texas and were addressed to the purchasers. In the terms of such contracts they were declared to be subject to English law and the jurisdiction of London High Court is prorogated. The telexes were in the name of OCSI and then is added " (As brokers only for Occidental Petroleum (Caledonia)Ltd)". In arranging sales OPCAL regularly had direct contact with OIOI in London and the telex completing the sale sometimes came from OIOI in London rather than Houston. Indeed a substantial proportion of the sales of OPCAL crude were dealt with in this way. This was often a matter of convenience connected with the time factor. Indeed OPCAL were in regular contact with OIOI in London not only in relation to sales but also to discuss arrangements to schedule the oil. Copies of the telexes exchanged by OIOI to negotiate sales would be sent to OCSI in Houston. The documents produced that related to the transactions spoken to by Mr Wood show clearly that even on occasions when the sale on behalf of OPCAL was directly negotiated by OIOI through London the written authority to complete the sale was given by OPCAL to OCSI in Houston. Mr Fitzgerald in his evidence indicated that in negotiating sales of oil produced by OPCAL, OIOI were acting under the terms of their Agreement with OCSI and also that the whole sales programme was managed from Houston. The Telexes show that on occasions OCSI are selling OPCAL oil to a Texas company the contract being completed in Texas. OCSI also from time to time assisted OPCAL in managing the scheduling and supply of oil sold. OCSI rendered accounts six-monthly for fees earned by them in respect of the oil sales and management function. These documents were produced. Thus for example the total charge made by OCSI to OPCAL in 1985 was $1,480,6000. What in effect happened is that OCSI charged OPCAL the latter’s proportion of the cost of running the former’s Houston office. Witnesses spoke to the agreed formula which was applied to arrive at that proportion. OIOI charged to OPCAL the proportion of the costs incurred by OIOI in dealing with OPCAL business and it was OCSI who billed OPCAL for this as one of OCSI’s outlays. From the detailed charges rendered by OCSI to OPCAL it can be seen that about one-quarter of the crude oil sales of the former relates to OPCAL crude. The invoice from OCSI to OPCAL dated 1986 shows as a separate item "Total 1986 charges to Occidental Petroleum (Caledonia) Ltd for selling North Sea crude oil purchased from third parties". The final sum brought out in respect of this item was $338,000. Significantly OCSI only appear to

charge OPCAL the actual costs of the OPCAL dealing. They do not charge OPCAL a commission or arms' length fee. Thus if OCSI did not render these profit free services to OPCAL the latter would require to incur the cost of running their own office in Houston or of employing an agent there and paying commission. Mr Fitzgerald deponed that OIOI staff would from time to time visit Houston and their reason for doing so was said to be that the overall crude selling policy of the Occidental Group was set there. Mr Endacott a Vice-President and General Counsel of OCSI deponed that OCSI was a subsidiary of Occidental Petroleum Corporation that is responsible for marketing the foreign equity crude of Occidental Exploration and Production subsidiaries (including OPCAL) as well as selling the domestic production of the equivalent American company Oxy USA Inc. Thus, he said, OCSI was the broker for the sale of Flotta crude oil for OPCAL. He said that OCSI worked in conjunction with OIOI in finding a buyer for OPCAL crude. He confirmed that OIOI performed marketing services for OCSI under the said Agreement. Mr Endacott makes it perfectly clear that as regards who had the ultimate say in any business done by OIOI for OPCAL it was Mr Wood in Texas who had the ultimate say. Mr Wood was consulted all the time and on occasions he would be asked to approve particular deals. Indeed according to the evidence of Mr Wood it was he who hired and fired OIOI's personnel and he did not doubt that it was he who was in ultimate charge not only in Houston but in London. Mr Glasgow gave some additional support to Mr Wood's claims when he deponed that it was Mr Wood who had directed him to work for a spell at OIOI's offices in London. The London traders reported to him and he was in touch with them a least twice a day. He visited London at least once a month. He reckoned that he spent about 50% of his time on North Sea business. The traders in London had a certain discretion in arranging sales of crude oil but only within the parameters set by Mr Wood. Although as sellers OPCAL had a theoretical right to object to oil sales negotiated under the auspices of OCSI in practice this did not happen. Indeed OPCAL did not have the expertise to monitor oil sales. It has to be noted that Mr Endacott's main responsibility was as a lawyer to review contracts so that he personally would have little contact with OPCAL. When the case by the claimant Mrs Busse was litigated in Texas there were certain preliminary proceedings concerning jurisdiction and in these Mr Wood, Mr Endacott, and Mr Glasgow gave depositions. Of course no decision on jurisdiction was ever made by the Texas court because the Busse case settled. However it has to be observed that in the Busse case the witnesses in question had as an interest on behalf of their employers in putting a negative gloss on evidence which may have supported Texas jurisdiction. In the present case their interest may be in making a case for Texas jurisdiction. For example in his Texas deposition Mr Wood had said that OIOI were brokers for OPCAL. Before me his position was strongly that OIOI's only function was to provide services to OCSI. Of course these two statements although they each place emphasis on a different aspect of the situation can be reconciled because even in providing sales services for OCSI, OIOI could be said to be acting as sub-brokers for OPCAL. Whatever the chain of the agency their function was as a broker rather than as an agent. Moreover I think a certain confusion entered into the evidence. Some witnesses took the view that if OIOI had conducted negotiations and

concluded a sale then they had done so as broker for OPCAL. I think a distinction has to be drawn between the function of the principal brokers who required to control and regulate the selling policy of the sellers and or those whose limited function as sub-brokers was to sell the oil in London within the limits set by their immediate principals in Houston. Mr Glasgow in his Texas deposition had also said that he believed that OIOI were acting as brokers for OPCAL. But Mr Glasgow, who was a defenders' witness, said in this case that both in Houston and in London dealers had to operate within a range of prices that was set by Mr Wood. Thus in the Texas proceedings the subjective assessment by these witnesses of the factual situation was not always entirely in accords with the emphasis they applied when they were giving evidence in the present litigation. The questions put to the witnesses in the Texas depositions were on occasion clumsily framed or confusing but even making an allowance for that there seems at times to have been a lack of candour in the presentation of the picture of the relationship between the relevant parties. That in my view is why in assessing the evidence of these witnesses it is particularly important to test it against the documentary evidence that exists such as the references to obtaining authority from OCSI and the charging arrangements between the various parties. Moreover as I have said Mr Fitzgerald had not given evidence in Texas and he seemed a reliable witness whose evidence could be used to test the other evidence. Mr Endacott in the Texas proceedings seemed to suggest that there was a service agreement between OPCAL and OIOI. Mr Endacott said that he had heard of such an agreement although he had never seen it. Mr Fitzgerald did not support the existence of such an agreement and certainly there was no other evidence of such an agreement or its terms. If there are discrepancies between what witnesses said in their Busse depositions and what was said in the present case the evidence of Mr Fitzgerald and the documents produced convince me that the true state of facts is what the witnesses are now saying. It should also be noted that as emerged from reference to the questions of Mr Nichols in the Busse proceedings even in these proceedings some of the witnesses were claiming that OCSI marketed all of OPCAL crude oil . In Professor Weintraub's view the relationship between OPCAL and OCSI was critical to the possibility of the claimants being able to establish jurisdiction in Texas. He considered that the relationship demonstrated the kind of continuous and systematic contacts that Texas law stipulates as a requirement for jurisdiction. As he put it rather graphically if an attorney could not get a finding of jurisdiction on the evidence of the OCSI connection he or she had better try some other line of work. When Mr Greene and Mr Kilgarlin gave their evidence they each took the position that the relationship between OCSI and OPCAL had nothing to do with agency but was simply the purchase by OPCAL of a sales service in Texas. They considered that OPCAL were merely producers and that it was no part of their function to trade in oil directly. They thought that it was merely fortuitous that sales of OPCAL oil were carried out in Texas. It has however to be noted that this line of defence was not put to Professor Weintraub in cross-examination. Mr Silva for his part indicated that when he found out the relationship between OPCAL and OCSI in relation to sales of North Sea oil he considered that this alone was sufficient to ensure a finding of jurisdiction against OPCAL in Texas. He had found that the relationship

between OCSI and OIOI was very close to the extent that when he visited the offices of OIOI in London he had found that many of the persons working there had claimed to be OCSI employees. He pointed out that an independent broker is generally a person who sells goods according to his principal's instructions. Here the tail was wagging the dog. Mr Wood in Houston made the decisions about the sale of oil and OPCAL's approval was in practice nothing but a formality since they had no marketing personnel available to them. It was not clear on the evidence that they had ever objected to a sale or a proposed sale by OCSI of Flotta crude although they may on rare occasions have intervened in respect of proposed speculation by OCSI in Brent crude (that is the oil bought in on OPCAL's behalf by OCSI for speculative re-sale). Both Mr Greene and Mr Kilgarlin thought that weight had to be placed on the choice of law and forum clauses in the sales documents. They thought that it was clear that OPCAL had structured its affairs to keep out of Texas. This was in contradistinction to the view of Professor Weintraub that one could not avoid Texas jurisdiction by a mere formal structuring of one's affairs. The defenders referred me to authority that they claimed bore on the question of the responsibility of a corporation for its agents. The Defenders' Senior Counsel prefaced this with the observation that a corporation can only act through the agency of its officers so that every activity of a corporation of course is an instance of agency. I was referred to International Shoe v Washington 326 US 310 (1945). I have already set out the details of the case and discussed it. The defenders use it to illustrate that the important factor is the flow of goods into the forum state . It was said in the case "'present' or 'presence' are used merely to symbolise those activities of the corporation's agent within the state which courts will deem sufficient to satisfy the demands of ' due process' . The defenders' main argument in relation to the OCSI position was that that company were merely selling a service to OPCAL such as might be provided by a solicitor or broker. Their argument in relation to Mr Wood was that OCSI were providing pricing advice to OIOI who themselves it was maintained were brokering most of OPCAL's North Sea oil. On the other hand in the brokering contract between OCSI and OIOI it is noteworthy that it is OIOI who are to provide advice to OCSI. It was pointed out how OPCAL had little or no direct contact with OCSI but rather channelled their instructions through OIOI. Reference was made to such evidence as indicating that most of the brokering of the North Sea oil was to Europe and carried out by OIOI. It is certainly true to say that at least a substantial proportion of the North Sea Crude was negotiated and sold through London and that this took place from the offices of OIOI. Indeed in respect of the proportions of sales at the two offices Mr Fitzgerald's evidence may at least to a degree be less accurate than those directly involved in the transactions. The defenders maintained that given that some of the evidence led by the pursuers was to the effect that OIOI brokered much of the oil and such evidence had not been specifically challenged then the pursuers could not pick and choose among their own evidence and were bound by it. Thus, it was argued, the case must proceed on the basis that the majority of OPCAL's crude oil was brokered through OIOI in London. However even if there is anything in the defenders approach to the evidence I think it was obvious that when the witness referred to 'brokered' they were referring to the actual physical act of completing the contracts. In

fact the direction and control of the sales operations were coming from Houston and not London. In any event in a proof of the complexity and extent of the present proof I think it is common sense to take an appropriately realistic view of the rules about the presentation of evidence provided that one is not dealing with serious questions of prejudice. In fact not surprisingly the parties' respective positions were being adjusted as the considerable body of evidence emerged. It may be noteworthy in this respect that the defenders for their part did not challenge many important aspects of Mr Fitzgerald's evidence. Mr Greene suggested that it was only fortuitous that OCSI were located in Texas but then the question of where it would be convenient and possible to locate an office co-ordinating the total crude oil sales of the Occidental Group was not really explored. Another suggestion coming from Mr Greene was that OPCAL's only function was to produce oil and the whole selling function was left to other better qualified members of the Occidental Group. That perhaps might have been a better argument if OPCAL were disposing of all their oil to the selling company and taking no interest in its ultimate disposal. However it is clear that OPCAL retained the ownership of the oil until it was sold and shipped and that any sales were on their behalf as principals. The contracts for the sale of the oil contained choice of law conditions nominating one or other of the British systems to be applicable to the sales and many at least of them had equivalent forum selection clauses. Mr Greene agreed that these conditions would not of themselves be determinative of the jurisdiction position. I can see how these clauses might have been very influential if any decision had to be made in a claim for specific jurisdiction in an action arising out of a completed contract. However in general jurisdiction the party seeking to invoke that jurisdiction may have nothing to do with the selection of forum clauses. Just to illustrate this in a telex dated 14 November 1985 coming from OCSI in Houston to Exxon International in New Jersey it is stated: "Since we have been unable to reach agreement regarding prices of Flotta Crude Oil in December and Brent Crude Oil in January 1986 we have agreed that cargoes of the respective crudes will not be lifted in the respective months under our arrangement. This will conclude the above referenced agreement between our Companies. Will you please confirm by return Telex that this is your understanding of our agreement." It would appear that this telex and other similar ones provoked a friendly response but it is not fanciful to suppose that such a communication could give rise to a difference of view resulting in litigation being raised against OPCAL in Texas. It is not at all certain that there would be a forum selection clause covering that situation. The essence of Mr Greene's evidence was that since the OCSI arrangement was only a package for the provision of services the case of Helicopteros precluded jurisdiction in Texas. Mr Kilgarlin attempted to draw a distinction between an agent with limited and specific authority such as a broker and a general agent with a mandate to conduct affairs on behalf of the company. It was only the latter kind of agent that would satisfy the tests laid down in Perkins . The defenders submitted that no or few supplies were actually coming into Texas (a certain quantity of oil was in fact sold to Texas companies). The defenders characterised the activities in Texas as not being a business activity but merely a person sitting behind a telephone that could be located anywhere. I think this argument is rather disingenuous. One can readily think of

many important business activities that nowadays can be conducted largely by computer or telephone. 11.4.9. Structuring of Affairs Professor Weintraub opined that Texas State Courts would be slow to scruple with the position taken on this matter in the Siskind and Middleton cases. On the other hand certain federal courts may take a rather a different view as was apparently done in Bearry . But that was in the 5th Circuit and the 6th Circuit seemingly takes a different position as was exemplified in Roethlisberger . It was contended that in the federal system there is at worst an open position. In the World-Wide Volkswagen case it was observed that foreseeability of exposure to jurisdiction is that conduct which is such that the defendant could reasonably anticipate being taken to the foreign court. This allows potential defenders to structure their conduct with some minimum assurance as to where and where not the conduct will render them liable to suit. However it was submitted that this means no more than if you keep away from the forum State you ought to be safe. In Siskind as I have already indicated Villa solicited business for Arizona by advertising in Texas. Approval was given to an observation in the case of Vencidor (therein cited) to the effect that a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings. In Middleton v Kawasaki although the pipe casing had been supplied by Middleton it had been manufactured by Kawasaki in Japan. Kawasaki placed employees in Houston and did market research and promotion there. This was held to be a purposeful availment of the benefits of Texas. It was said by the Court that Kawasaki cannot maintain eyes and ears in Texas and yet keep the rest of its corporate self safely in Japan away from Texas plaintiffs. It was contended by the pursuers that albeit that many of the relevant contracts had choice of law or forum selection clauses relating to states other than Texas it is difficult to see how certain aspects of the continuing obligations of performance (as for example in relation to audit) could be performed in Texas without the protection of Texas law and the Texas Courts. In Holt Oil and Gas Corporation it was held that there were insufficient contacts for specific jurisdiction but general jurisdiction was established. It was observed that the significance of the defendants' contacts was diminished by the fact that there was a choice of law clause providing for the application of Oklahoma law. However the effect of the contacts was diminished rather than eliminated for the Court found that jurisdiction had been established. Most though not all of the OPCAL contracts with Texas have choice of law and waiver of forum choices in favour of Scotland or England as the case may be. Whereas Professor Weintraub accepted that this was a relevant consideration he thought that it was by no means conclusive. Indeed if there were in fact substantial contracts with Texas these clauses may suggest an attempt to camouflage the true nature of the dealings. Mrs Sondock for her part thought that choice of law clauses would not be determinative of jurisdiction although the forum would apply Scottish law to matters affecting the contracts. She was certainly clear that a choice of forum clause would not be conclusive in a question of general jurisdiction. Her evidence was criticised on the ground that she had arrived in Court unprepared for the evidence she gave. She certainly had not undergone extensive preparations for certain areas of her evidence and it was not clear just what particular points she was expecting to be asked about. She was for example examined as to

the expected quantification of Texas Jury awards. Insofar as her evidence went it seemed balanced and based on her extensive experience in the District Courts. She had of course also sat for a spell on the Texas Supreme Court. In any event it has to be noted that two major early contracts have provisions for Arbitration steps to be taken in Texas. Mr Greene and Mr Kilgarlin on this question too took positions opposite to the pursuers. They relied very much on Bearry . Mr Greene thought that it was open to a party to opt out of invoking the benefit of a State's law and thereby avoid jurisdiction. He observed that Vencidor had been decided prior to World-Wide Volkswagen . In relation to Mr Kilgarlin it was contended by the pursuers that it was totally illogical for him to argue that it is bad jurisprudence to allow a party to control his own destiny in relation to the time of contracts but to argue for parties controlling their own destiny by the structuring of their affairs. The pursuers contended that even specific jurisdiction could survive choice of law or forum selection clauses in the contract which gives rise to the action but that in relation to general jurisdiction the case is even stronger. I think that this must be so. Where a case is based on specific jurisdiction then a forum selection clause while not conclusive may be quite a strong consideration in relation to jurisdiction. In relation to general jurisdiction the position is quite different and parties may not in any way be connected with what was introduced to a specific contract. 11.4.10. Criticisms of Pursuers' witnesses The defenders spent some time criticising the quality of certain of the pursuers' witnesses and Professor Weintraub and Mrs Sondock in particular. The defenders did not attack Professor Weintraub's integrity or qualifications but they maintained that he did not give the impartial and balanced evidence to be expected from an expert witness. The suggestion was that his evidence savoured more of the academic polemicist or advocate than the expert witness. It is certainly true that in giving evidence the Professor expressed his views in more colourful and expressive language than we would normally expect from an expert in Scotland. He was also a witness with a strong personality. However whereas some of his mode of expression may have been a feature of his personality I am also prepared to allow that some of his language was really attributable to differences in local idiom. What of course interested me was not the articulation of his views but the quality of what he was saying. Professor Weintraub was appearing in Court as a witness for the first time and of course he was appearing in a Court the style of which was unfamiliar to him. However he was no stranger to the generality of Court appearances. In Texas in addition to his academic work he is regularly employed in litigation as a consultant or in trials to argue as an advocate matters covered by his special experience. I am not surprised at this for on any view he has a very extensive knowledge of the legal detail of subjects such as jurisdiction. Professor Weintraub was candid enough to accept that he preferred to ask questions rather than to answer them and I believed him. However experts who have almost made a career of acting as witnesses also can have their own failings and are certainly less refreshing. It is certainly true that there were certain cases of high authority in Texas that Professor Weintraub did not like and he did not hesitate to say so vigorously. Thus he certainly did not admire the case of Helicopteros. He opined that if he had been handling the case he could have won it and that assertion although quite irrelevant may

well be true for it was a very narrow decision. Senior Counsel for the defenders submitted that the way that Professor Weintraub dismissed that case was verging on the reckless. Moreover he also did not admire the decision in the case of Asahi . Indeed he had been the author of an article entitled "Ahasi sends personal jurisdiction down the tube". This of course discusses the constitutional limitations on the power of a State Court to accept jurisdiction because of the US constitutional requirement not to offend against due process. However he did not dispute that the three important tests in Asahi were (1) the particular interest of the plaintiff to raise the action in the State selected (2) the burden on the defendant in defending the case in that State, and (3) does the state have a legitimate interest to entertain the action. When he came to express an opinion on the effect that Ahasi would have had on the present case he did not think that it would have precluded Texas jurisdiction because it had (in his view) been badly decided but rather on the basis that it could be distinguished. He also was not keen on the decisions arrived at in cases such as Guardian Royal Exchange Assurance , Malaysian Assurance , and Bearry . I formed the impression as the defenders claimed that Professor Weintraub was sometimes inclined to wander off into an academic analysis of certain decisions. This is not surprising for he is a distinguished academic and part of his regular function will be to assess the state of the law. I found no difficulty in understanding what Professor Weintraub was doing during the different parts of his evidence and distinguishing that which was truly relevant. Moreover just because the Professor was criticising decisions in cases of the highest authority does not mean that such evidence was always irrelevant. Helicopteros and Asahi were very narrow decisions. Indeed in Helicopteros the Supreme Court of Texas issued a decision and then withdrew it to issue another decision to the opposite effect. It was obvious from the evidence that many lawyers are not entirely happy about Helicopteros. Mr Justice Brennan for one was obviously not happy about it which is why he was in the dissenting minority . But this shows that there have always been some doubts about the decision although of course it became binding. Having been referred to countless American decisions I became aware of the fact that because America comprises such vast and varied State jurisdictions precedence is not always followed as tightly as we might expect in this country. Thus there is a question as to how even the US Supreme Court with a different combination of judges might now decide a case where the facts could be narrowly distinguishable from Helicopteros (which itself over the course of its history was decided by the narrowest of majorities). Thus some of Professor Weintraub's analyses of cases may well point to how another Court properly instructed might approach the problems that arise in this case. I found Professor Weintraub a very well-informed witness and had no hesitation in giving weight to his views. However that is not to say that I did not have doubts about certain points in his evidence which given the length of his evidence, and the complexity and difficulty of some of the matters he had to deal with, is not surprising. The defenders also criticised Mrs Sondock. She was a retired judge of the State District Court and had also sat on the Texas Supreme Court. Indeed she had been sitting on the bench of the latter Court when Helicopteros came before it. She had wide direct experience of the Special Appearance procedure. She had been convened by the pursuers as a witness to

deal with certain procedural matters but she also expressed a view as to whether a Texas Court would have any difficulty in finding OPCAL liable to their jurisdiction. Her answer was that in relation to the assumptions she had been given there would have been no problem in according jurisdiction. The defenders argued that her evidence should be ignored because she had come to the proof unprepared. Certainly her views were general rather than based on detailed research. She had been provided with the contracts which the pursers attempted to use to establish their case on Minimum Contacts. She had not studied the details of these cases but knew their outline from the assumptions that were put to her in Court. Before she gave her evidence she was not aware that many of the relevant Contracts and Purchase orders had forum selection clauses nominating British Courts and choice of law clauses nominating British systems of law. The defenders also maintained that she had been given the wrong assumptions in relation to OCSI. These assumptions of course depend on the view I have formed about the legal implication of the OCSI situation. She had not researched personally the law in relation to jurisdiction but had had her research assistants put together the significant cases that she had studied on the plane over to Britain. I have already commented on this witness in relation to selection of forum clauses. In a general sense Mrs Sondock was a sensible and experienced witness. However she had not researched the jurisdiction question anything like as thoroughly as Professor Weintraub so that I doubt if she adds much to the pursuers' case on that matter although her view that Helicopteros was decided as a single purchase case is a useful supplement to Professor Weintraub's view (particularly as she had been a member of that Court when Helicopteros was before it). In relation to awards of damages she also speaks with the benefit of considerable relevant experience. In comparing the pursuers' experts with those of the defenders it also has to be acknowledged that Mr Greene and Mr Kilgarlin were good witnesses although at the end of the day there were areas of their evidence which I could not accept. In the case of Mr Greene he was no doubt a first class Court attorney. Nevertheless he had nothing like the specialist experience of Professor Weintraub in jurisdiction questions. Indeed both in relation to jurisdiction and personal injury wrongful death claims his experience seemed somewhat restricted. Mr Kilgarlin had obviously been an eminent judge in Texas for some years. Once again his knowledge of jurisdiction problems although extensive and perhaps expressed with less brio than in the case of Professor Weintraub did not always stand up to the depth of Professor Weintraub's specialist experience. I thought that Mr Greene and Mr Kilgarlin perhaps placed undue emphasis on the effect of the case of Helicopteros which of course was an important case but may not have been quite so destructive of the pursuers' prospects as they each suggested. Moreover I cannot agree with their analysis of the OCSI arrangement. On that question the views of Professor Weintraub and Mr Silva seem to me to be more realistic and in accordance with the totality of the authorities I was referred to. In the case of the Equal Treaty rights, as will be seen, although Mr Kilgarlin can speak about the matter with considerable knowledge, I did not feel that his expertise could carry the weight of a specialist like Professor Baade. The latter was an impressive witness who was fair and extremely well informed about his subject. 11.4.11. Arguments and Conclusions

Arguments were addressed to me on the jurisdiction question in the light of the authorities and commercial dealings which I have outlined above. The pursuers submitted that general jurisdiction had been accepted in Texas as an acknowledged route to jurisdiction since Helicopteros but that the State Courts had not sought to confine the application of Helicopteros to the factual mould of Perkins . The pursuers' main witness on the matter was clear in his view that Helicopteros was not to be taken as confining the limits of general jurisdiction to particular patterns of activities. Indeed any difference between State decisions and Federal decisions may be attributable to the fact that the assessment of minimum contacts was exclusively a matter for State Courts in cases up to the limits of the United States constitution. Professor Weintraub considered that the OPCAL purchases in Texas would be enough to create Texas jurisdiction certainly at trial level but that the OCSI dealings would be the final blow to any contrary position. Whereas he accepted that the proportion of Texas dealings to total business could be a factor on the basis of the Kervin case it was not necessary to pay heed to that proportion provided that the contacts with Texas were continuous and systematic. Helicopteros was essentially a decision on its facts based on the view that the helicopter purchases and maintenance dealings were part of a single global package and therefore had to be regarded as only one contact. Mr Greene for the defenders on the other hand places great weight on Helicopteros which he interprets as laying down that general jurisdiction only applies when there is an administrative or supervisory function carried out in the forum state as was the case in Perkins . However it seems plain that the Texas State Courts have not interpreted Helicopteros in that confined way. Professor Weintraub points out that he accepts the fact that Helicopteros has been cited in 30 Opinions of Texas Courts but this has been to support the concept of general jurisdiction and not the narrow view of the case advanced by Mr Greene. Mr Greene on the other hand does not accept that Helicopteros has only been used for the general purposes indicated by Professor Weintraub. Mr Kilgarlin takes the same view of Helicopteros and Perkins as does Mr Greene. Mr Kilgarlin emphasises that the important matter is to look at a holding in a case and he considers that the holding in Helicopteros was that it is necessary to constitute the kind of continuous and systematic general business contacts the Court found to exist in Perkins . As I have said the difficulty with Mr Kilgarlin's view is to reconcile it with the State decisions where general jurisdiction has been held established in a situation well short of the somewhat extreme facts in Perkins . Indeed Mr Kilgarlin modifies his view somewhat during the course of his cross-examination and accepts that the corporate presence in the forum State need not be management in the literal sense but rather in the generic sense to the effect that there is a corporate presence within the State. Mr Kilgarlin thought that the Design Information and Temperature Systems cases were aberrations. Mrs Sondock was an experienced Trials judge and of course also had experience at Supreme Court level. Indeed she had sat as a Justice in the Helicopteros appeal. She thought that given the level of contracting between OPCAL and Texas and the OCSI relationship the Texas courts would have sanctioned jurisdiction. She confirmed that as in Britain a Texas Court would hold a principal accountable for the actions of the agent. She had little doubt that in Helicopteros the Court

had proceeded on the basis that the purchases of helicopters were a single supply and the decision was thus fact driven in respect that it depended on the Court's assessment of particular facts. She thought that as few as six contracts would have been sufficient to justify Texas general jurisdiction although I think that she was rather pushed into specifying that figure which must be taken to incorporate an arbitrary element. Certainly in my view an important distinction between the present cases and Helicopteros is that in these cases there is not merely a single Texas supplier but a considerable range of Texas suppliers. Indeed there were 145 Purchase Orders with 33 different suppliers. The combined worth of these contracts was almost two million dollars. Moreover unlike the helicopter company in Helicopteros OPCAL were not making a free choice to come to Texas. Some of the equipment they purchased there because of its specialised nature was only available in Texas. The Blow-out Preventer was an example of such equipment as was computer technology designed specifically for the oil industry. They were in fact dependent on Texas skill and oil development expertise for the creation and maintenance of their North Sea operations. They had made a deliberate decision to involve themselves in an industry which depended on a considerable and continuing contact with the state of Texas. With regard to the arrangements between OPCAL and OCSI the pursuers emphasised that the suggestion that this was simply a purchase of services had not been put to Professor Weintraub their principal witness on jurisdiction and indeed the Professor had robustly claimed that the OCSI agency (as he saw it) was fatal to any attempt to resist Texas jurisdiction. In fact he said that it was a virtual certainty that in the whole circumstances the Piper Alpha claimants would have been able to establish jurisdiction in Texas. With greater access to material his view that jurisdiction was available to claimants had become even firmer at the time of his evidence than it had been when he submitted his Report. Mr Silva's opinion on jurisdiction was the same. The respective opinions of Mr Greene and Mr Kilgarlin depend substantially on the view that OCSI were not really agents contracting in Texas but simply providing a service purchased like any other service. They also were ready to accept that the sales role had largely been assumed by OIOI in London. OCSI for their part happened to be based in Texas but the business they conducted was not specific to Texas and could have been (and was) conducted all over the world mainly by telex and telephone. Mr Greene argued that OPCAL were in the business of extracting oil rather than selling it. However it seems to me that such an argument could be advanced by many manufacturers none of whose efforts would be fruitful if the product was not sold at a decent price. Albeit that formal authority was obtained from OPCAL it was OCSI which actually entered into sales contracts for the crude oil production. It is difficult to see how OCSI could have entered into effective contracts for the sale of OPCAL's oil if they were not OPCAL's agents. OCSI had not only acted as OPCAL's agents but they were continuously retained in that capacity. Mr Greene contended that OCSI were doing no more for OPCAL than Texas distributors had done for Beech in the Bearry case. However it was not claimed that the said Texas distributors had controlled the sales policies of Beech nor entered into sales contracts with their customers specifically as agents of Beech. In fact the Court in Bearry observed specifically that Beech had no agents in Texas and if that fact had been

otherwise it is not certain that the decision in Bearry would have been the same. Mr Greene accepted that if OPCAL had set up an office in Texas to sell their produce the position may have been different. However I am not sure that I can appreciate the difference in respect of purposefully availing themselves of the benefits of Texas between trading through their own office and employing an agent based in Texas to perform the same function. If OPCAL were permitting their entire sales function to be regulated through Texas (as part of an Occidental operation) it is difficult to maintain that they were structuring their affairs so as to avoid association with Texas. In effect although OPCAL had the power to make a final decision on sales the power was in reality little more than a veto which was rarely if ever exercised. OPCAL did not have the experience or personnel to make independent oil sales. However by way of conclusion Mr Greene expressed the opinion that more probably than not any attempt by the claimants to establish jurisdiction would fail. He accepts that there is some risk that jurisdiction would be accorded but the risk of that he thought not to be substantial. Mr Kilgarlin thought that it had not been shown that there was any agreed arrangement between OPCAL and OCSI but that ignores the fact that there were arrangements that operated between the companies over a period of years. With regard to the possibility of a successful appeal by the defendants to the United States Supreme Court in the event of an adverse decision under the Texas State system Professor Weintraub took a pessimistic view. Appeal is only possible with leave of the Court which is sparingly granted. Since 1945 only 12 cases on in personam jurisdiction have been allowed of which only two have been from Texas. His view was that once standards have been laid down the application of the rules depends very much on the facts of a case and the Supreme Court are inclined to leave this to the State Court system. At best having to rely on a successful appeal to the U. S Supreme Court would involve inconvenience, delay, and expense. In Texas a successful defender does not recover costs so that a protracted litigation is not an attractive prospect. Mr Greene, not unexpectedly, while unable to assert with confidence that the U. S. Supreme Court would have entertained an appeal in the Piper Alpha situation was more sanguine about such an appeal than Professor Weintraub. He thought the Court might have been influenced by the fact that the case represented a major disaster with international implications. Half of the twelve Supreme Court cases were decided between 1980 and 1987. Moreover the Court tended to take a lively interest in Due Process questions. The Justices might also be concerned if they thought the State Courts were ignoring what had been said in Helicopteros . This view must of course depend on whether or not the Supreme Court interprets the effect of Helicopteros as Mr Greene reads it. However Mr Greene accepted that only something like 4-5% of applications to the Supreme Court for right to appeal succeed. The pursuers urged strongly that in assessing OPCAL's contact with Texas I should consider contacts right up to the settlement. It was pointed out that even after the disaster OPCAL required to go to Texas to get the technical help needed to extinguish the fire. This illustrated their reliance on Texas expertise. The case of Scott v Huey L. Cheramie Inc. 833 . S. W. 2d 240 (1992) was not put by the defenders to Professor Weintraub when he expressed the view that it was relevant to look at post-accident

contacts. In that personal injury case the Court of Appeals of Texas declined to look at a contact that did not exist at the time of the injury. Mr Greene for his part considered strongly that Scott had been correctly decided and indeed thought that it would be dangerous jurisprudence to allow a ground of jurisdiction to be created (or removed) once a cause of action had arisen. Mr Kilgarlin agreed with Mr Greene's sentiments. As I have already mentioned, in his book, Professor Weintraub sees the jurisprudence rather differently (Commentary on Conflict of Laws

- 3rd Edition 14-61). Perkins , Design Information , Temperature Systems , and Psarianos are all cases where actings post-dating the cause of action seem to have been taken into account by the court. I am not sure that the Texas Courts are themselves completely clear as to the date at which the essentials of jurisdiction are to be determined. I can see that in relation to general jurisdiction since this is in a sense similar to domicile it may well be possible to argue that jurisdiction at the time of the initiation of the action counts although this would not exclude jurisdiction also being established according to the state of affairs at the time of the cause of action. However I do not think that it is necessary that I form a definite view about this matter. If one looks at the position at the time of raising the action and supposes that at the time of the accident the necessary contacts existed then the connection with Texas continued for some time after the accident. On the other hand I do not think that any transactions after the accident affected what can be read into the pre-accident contacts. If the transactions before the accident were not in themselves sufficient then I do not believe that what happened after the accident would affect the position. The proceedings after the accident could I suppose have an indirect affect on the jurisdiction question. For example the fact that after the accident OPCAL had to bring over from Texas fire fighting experts like Red Adair may confirm the view that it was foreseeable that because of dependence on Texas expertise it would all along be possible to predict that from time to time Texans would be required on or near the platform. However this is I think also obvious from the pre-accident contracts. It is clearly established that the cases on Texas jurisdiction are very fact-driven. Moreover although guidelines for resolving jurisdictional issues exist these should not be applied in a mechanical way and the whole picture has to be considered and balanced. In respect of Texas assumption of general jurisdiction the two bastions of authority representing the position at the either extreme of the possible situations are the US Supreme Court cases of Helicopteros and Perkins . The former case covers the situation when the contacts arise from contractual arrangements in Texas. Whether or not Professor Weintraub admires Helicopteros it is a decision enjoying the highest authority in the United States and has to be regarded as governing the position so far as its conclusions go. Thus if a party was trying to set up jurisdiction on the mere basis of a package of goods and services from a single supplier in Texas Helicopteros could not be ignored. The facts in the present cases display transactions which move beyond Helicopteros and the question is do they thus move far enough. Certainly the holding in Helicopteros appears to say the "purchases" are not enough for general jurisdiction. However the case itself was dealing not with one purchase but a series of purchases but the significant fact is that they were all from the same

supplier and part of the same sales arrangements. It could be said that the purchasing company had decided that in relation to the purchasing, use and maintenance of helicopters they would stick to a single supplier and it was only the coincidental location of that supplier in Texas that had brought about the Texas connection. The Court was certainly not expressly considering a series of purchases from many different suppliers. Helicopteros was a difficult and narrowly decided case. I think there would be a substantial possibility that if in an important case a State Court was to appear to be ignoring what was intended the US Supreme Court might decide to entertain an appeal. However this could not be relied on. The State Courts have not always chosen to give Helicopteros other than a narrow significance and at least the defendants in the actions we are considering would have to face up to a real possibility that Helicopteros would not help them. When a case enjoyed such a division of judicial opinion it must be anticipated that if a similar question arose where different considerations came into play it is definitely possible that the Appeal Court would seek to limit Helicopteros to its facts. There is certainly a reasonable argument that the facts of the present case ought to be regarded as quite distinguishable. If a purchaser requires to make purchases and chooses to go to a particular market because the opportunities available there appeal to him it might be difficult to argue that the transactions in question represent a purposeful availment of the privileges and protection of Texas law. The purchaser may well have had no special interest in going to Texas but was simply attracted by what the market there was offering him. It may be very different where the defendants have decided to develop a business which is in practical terms dependent on Texas goods and expertise so that over a considerable period they will require to have a substantial connection with Texas. This is borne out by the fact that over many years OPCAL did business with a wide variety of Texas firms and tied themselves to many business transactions there, some of them of an extensive and continuing nature. With such regular and essential business contacts with Texas it may be that OPCAL purposefully committed themselves to a business connection with Texas. The problem is that this, although a perfectly reasonable argument, can in no way be regarded as decisive. Just what risk OPCAL and its Participants were under in respect of these dealings through Texas is a matter of fine judgment; and of course these contacts do not represent the totality of the risk even looking at the problem without considering OCSI. OPCAL and its Participants have on any view associations with many companies carrying out a variety of activities in Texas and in a valuable and protracted litigation the negotiating parties must as Mr Silva said be concerned about what surprises might come to light. If I had to describe the precise risk OPCAL were under in numerical terms I should find this difficult. A view that the risk can be described as 75% or for that matter 30% must be somewhat arbitrary given the complexity, diversity, and uncertainty of the American and Texas legal systems. If I had to form any view I should be inclined to believe that the pursuers were somewhat over-optimistic in considering that there was little doubt that they would succeed on jurisdiction on the contracts alone. The settlements offered would certainly have been somewhat generous had the OCSI transactions not been discovered. On the other hand I think the pursuers are right to claim that the settlement was at the time the best on offer and whether or not it was reasonable to

settle on the best terms available rather than face a protracted, difficult and expensive series of litigations is a difficult question. Fortunately it is a question that I do not have to answer for I consider that the OCSI situation transformed the claimants' prospects in respect of jurisdiction. I cannot read the facts relating to OCSI as I have reviewed them as meaning other than that OPCAL were selling the whole of their production through and under the control of agents in Texas. OCSI were not purely a convenient sales service purchased by OPCAL. Unlike normal selling brokers OCSI were not merely selling according to their principal's instructions. They were in fact controlling and directing the whole sales operation. They were not advising on pricing. They were determining prices and if the OIOI sales personnel in London had ignored what essentially were instructions I have no doubt that the wrath of Mr Wood would quickly have descended upon them. One cannot ignore the reason why sales were controlled through Texas. OPCAL had decided for whatever reason that as matter of policy the sales of the whole of their oil production in the North Sea should be co-ordinated with the sale of crude oil from other Occidental companies. Given that they were a member of a large group of companies that may have been a perfectly sensible policy. This act of co-ordination took place in Texas and it may well be that this was the most advantageous location for that enterprise. Looking to the basic requirements of general jurisdiction in accordance with Perkins and the cases which follow it (which I have already described in detail) it is clear that the contacts need to establish jurisdiction must satisfy the test of being a purposeful availment of the privileges and protections of the law of Texas. Another expression of the test that simply reflects the test I have just mentioned is that the defendant's contact with the forum state must be such that he can reasonably anticipate being hauled into court there. It has been observed as I have already commented on that to do business in a state is equivalent to seeking the protection of the laws of the state. I do not agree with the submission of the defenders that to do business in or with a state it is necessary to supply something into the state. In Perkins what they did in Ohio was to manage and direct the corporation. The company was a mining corporation and it was never suggested that the mining products if any passed through Ohio. Many corporations have their corporate business seat in a country without necessarily importing goods into it or selling materials there. As it happens OCSI sold some of OPCAL's oil in Texas but I do not think this is the critical element in their position. OCSI had their business office in Houston and their business was to act as selling agents there. They were the nerve centre of OPCAL's crude oil sales and OPCAL made the choice to sell all their oil in the manner I have described. The remarks in the authorities suggesting that bringing business into Texas was a prerequisite of susceptibility to jurisdiction are largely derived from specific jurisdiction cases involving product liability. Certainly OPCAL made an effort to shield themselves against Texas proceedings by their contracts with particular oil purchasers but it must have been obvious to them that as they had located substantial selling operations in Texas they were vulnerable to jurisdiction in general jurisdiction cases. This is why within hours of the accident Mr Silva was wending his way to London to direct the negotiations. The degree of risk is similarly illustrated by the fact that at the same time Mr Benton Musselwhite and other Texas attorneys were also proceeding to Scotland to sign up clients for litigation in

Texas. These attorneys are experienced litigators in Texas and since their feeing arrangements depend on success their response to the accident may suggest that the views of the pursuers' advisers were not eccentric. Thus in terms of substantial and continuing contacts Mr Silva's apprehensions at the end of the day proved well-founded. Looking at the whole evidence about contacts with Texas there can be little doubt in my view that there were such contacts as would be needed to render OPCAL and its Participants very vulnerable to litigation in Texas. The fact that OPCAL had sufficient minimum contacts to attract jurisdiction in Texas is not conclusive because it is also a necessary factor that the assumption of jurisdiction should not offend against Due Process. This aspect of the cases was argued at some length. With regard to Due Process the pursuers argued that if sufficiently substantial contacts with Texas are shown the burden would be on the defenders to show that it would be unfair to permit jurisdiction to operate. The critical factor in this case is that OPCAL was a member of a group of companies many of which have a considerable presence in Texas. Indeed unlike many foreign defendants OPCAL has access to a substantial support structure in Texas. Immediately after the accident Vinson & Elkins were instructed to act in the matter. The firm had acted extensively for members of the Occidental group and were familiar with their affairs. They had acted in matters that gave rise to the building of Piper Alpha and indeed had negotiated 18 of the major contracts. The immediate parent of OPCAL was Occidental Petroleum (Great Britain) Ltd. (OPGB). This was an inactive holding company. The parent of OPGB was Occidental Overseas Ltd. (OOL). This company too was merely a holding company and was registered in Delaware. OOL's parent company was Occidental International Exploration and Production Co. (OIEPC). This was an active company that effectively exercised control over OPCAL. It was registered in California but had offices in Houston ,Texas. The parent company of OIEPC was Occidental Oil & Gas Inc. (OOG). This company was also registered in California but had its head office in Texas. In 1988 the Chairman and Chief Executive Officer of OPCAL, John Brading, was also a Director and Vice-President of OIEPC. Many employees of the Occidental Group in Texas had extensive experience of the world-wide operations of the Group including the operations in the North Sea. Employees of OIEPC, while remaining on the payroll of that company were sent abroad to carry out executive duties for other Occidental companies, including members of the Group in Britain. A number of the senior officers of OPCAL were American. Mr Foster who was a senior Legal Advisor of the Group (and was based in California) came to Britain immediately after the accident and participated in preliminary settlement negotiations. Mr Silva of Vinson & Elkins was also in Britain involving himself in negotiations from an early date after the accident. Moreover two members of the Consortium, at least, namely United Texas Petroleum Ltd. (U. T. P) and Texaco had close practical connections with Texas. Mr Crain, also involved in settlement negotiations from an early stage was employed by UTP Holdings Inc. at their Houston office. The parent companies of UTP. had offices in Texas and about six companies of the Group were registered to do business in Texas. Three of the directors of the Consortium Company were senior officers of UTP and were based in Texas. Over the years UTP in Houston provided services to the Consortium Company under the terms of a service agreement. All lawyers in

the corporate Group reported to Mr Crain in Houston. In 1988 the Group had 1700 employees in Houston. Mr Crain was working in Houston on 6 July 1988 at the time of the disaster. The day following upon the disaster he had a meeting at Houston to outline UTP's plan for dealing with it. Within a week he had travelled to London and he described his function there as being to advise UTP in all legal issues arising from the disaster. With regard to Texaco the position was rather different. Their in-house legal department is centred in New York and they obtained advice from New York lawyers. However the Group also had some connection with Texas. Thomson North Sea Ltd. were a holding of the international Thomson organisation based in Canada. However their interests were world-wide and they had companies in Texas. They had been involved in selling propane gas to Texas and the contract had been negotiated and signed there. Thus clearly they were able to function comfortably in Texas when it suited them. The inconvenience of citing eyewitness to Texas must be considered but there is an extensive use of depositions in Texas procedures and many (though not all) of the eyewitnesses would themselves have been possible claimants favouring proceedings in Texas. With regard to the interests of the forum state in the proceedings there is little doubt that Texas has a particular interest in the oil industry (including offshore oil production). The Piper Alpha disaster was said to be the largest offshore disaster in history. The consortium members were members of Groups of companies well known in the oil industry and particularly in Texas. The Texas Courts had a clear interest in safety arrangements on oil platforms because many were designed, built, serviced or operated in Texas. They had a substantial interest in the effectiveness of equipment in which Texas led the world. Professor Weintraub considered that it would be difficult to persuade a Texas Court that Texas was other than the oil capital of the world. Of course what is not certain is that the defendants in Texas proceedings would have disputed liability. This may have been done for tactical reasons but I think the experts agreed that the prospects of avoiding liability were remote. If the Texas Courts are merely being asked to quantify damages then the interests of the Texas state may be less important. On the other hand not only was a Texas citizen, Mr Busse, one of the deceased but it is clear that Texas residents were at intervals required to be or work on the platform. Texas may therefore have some interest in ensuring that persons injured in such an accident are (in the view of their Courts) effectively compensated. In relation to the interests of the plaintiffs obtaining effective relief the argument would have been available that Texas was their effective choice of forum. Certainly the representatives of the deceased Busse had an even stronger claim in that regard. The Busse family had been able to litigate in Texas and if other claimants had sought to raise actions there they may well have been able to attach themselves to the Busse actions. The pursuers argued that in the whole circumstances the present cases were very different from Asahi . That case had not been concerned with matters of interest to Texas such as safety standards and possible compensation of Texans but has been a dispute about indemnification between two Asian companies neither of whom had any substantial connection with America. On any view OPCAL had a much more substantial connection with Texas and their activities were more directly related to that state. They had access to major resources including legal resources in Texas. Moreover an important point in the

present case not present in Asahi is the existence of Texas shareholding interests in OPCAL. This consideration was commented upon in Helicopteros . Mrs Sondock makes the point that Due Process has not to be confused with forum non conveniens . The latter test is decided on a balance whereas in relation to Due Process the defendant has to establish a compelling case that he would be unduly burdened by having to litigate in Texas. It has to put the defendant in a position that could be described as outrageous. Professor Weintraub takes just as strong a view. He declares that in practice Due Process has little or no application to general jurisdiction. Once the necessary continuous and systematic contacts with Texas have been satisfied then it is difficult to argue that it would be unfair for the defendant to face litigation in Texas. If they can do business there they can litigate there. Asahi made this clear. Like Mrs Sondock he considered that for Due Process to operate the standard required is considerably more than a balance but rather something akin to oppression. He accepted that if claims in Texas had arisen the fairness argument could have been advanced by the defendants but considered that in the light of OPCAL's relationship with Texas it would have been defeated. Mr Greene took quite a different view as to the possibility of an objection to jurisdiction based on Due Process being sustained. He considered that apart from the case of the Busse claimants Texas had no citizens to protect and that this was a factor adverse to jurisdiction. The fact that a claimant could get more money in Texas was not a legitimate interest. He disputes that Texas would have an interest in the safety aspect of the claims when the matter involves the North Sea where there is a separate regulatory system in force. He claimed that the country with a regulatory interest was the United Kingdom. This is however possibly a double-edged argument since an extensive inquiry had already been held in Scotland to deal with the safety and regulatory aspects of the situation so that these matters may not have been too critical in the working out of private rights. The fact that the Participants had legal back-up and other administrative resources available to them from associated companies in Texas was said to be irrelevant unless alter ego was being advanced (he cited MacFee). He claimed that there were no cases that mention these as important factors (but it has to be noted that in Asahi and Guardian Royal these factors were not present). One matter of considerable inconvenience and burden was said to be that the defendants would be faced with a situation where they would require to present to a Texas Court matters of Scottish substantive law such as the availability in Scotland of certain heads of damages. However even Mr Greene conceded that in some respect the present cases may be rather stronger than Asahi because of the Texas connections of OPCAL. He took a different view of the connection between OPCAL and Vinson & Elkins since as he said it is easy enough nowadays to arrange for a lawyer anywhere in the world. However he was unable to point to any case where Asahi determined the jurisdiction issue in a general jurisdiction case. It also has to be observed that Mr Greene formulated his opinions on this matter under the assumption, false as it happens, that OPCAL conducted all its business in the United Kingdom. Mr Kilgarlin also thought that the result in the Piper Alpha cases would have been the same as in Asahi and Guardian Royal. He thought that whereas the qualities of the contacts with Texas and fairness considerations are intertwined his view is that this happened in Asahi.

The Asahi factors concentrate on the burden placed on a defendant in requiring to litigate in a foreign State. I think what has to be remembered is that Ahasi is a special jurisdiction case. Similarly the listing of the various factors that have to be considered in relation to Due Process tends to be taken from special jurisdiction cases. Given that the overriding consideration in the constitutional test of Due Process is fairness and substantial justice there are certain special considerations that apply in at least some general jurisdiction cases. However I am not suggesting that the Due Process test has not to be considered in a general jurisdiction case. There may be factors in such a case that would make it very inappropriate to litigate a dispute in Texas. As was observed in the authorities above once general jurisdiction is established one is well on the way to establishing a situation where it is difficult to reject jurisdiction because of Due Process. As Mrs Sondock observed Due Process is something different to forum non conveniens . The Court is not weighing relative convenience. The court has to be satisfied that litigation against the defendant in Texas would be substantially unfair. Something more akin to oppression than to inconvenience. One must regard how general jurisdiction arose in this case. As I have held, the pursuers purposefully decided to conduct a major part of their business through Texas and in so doing deliberately exposed themselves to being sued in Texas. Having put themselves in that position it sounds a bit odd that they should now be arguing that it would be unfair if a party chooses to sue them where they have in effect an established place of business. If a defendant creates a ground of general jurisdiction then it might be said that unless there is some manifest unfairness a party should be entitled to raise proceedings against the defendant where he regards it as being in his best interest to so act. Just to illustrate this it was accepted by the defenders that Piper Alpha claimants could properly opt to raise their proceedings in Scotland or in England. In any event looking to the overall position I do not see that requiring to litigate in Texas would have placed OPCAL and its Participants under any undue pressure with regard to the conduct of the litigation. It may be that the final result would not be so favourable to them but that is not the point. They have themselves chosen to make Texas one of the significant centres of their activities. It is interesting that in some of the earliest contracts, OPCAL's predecessors in title chose to select Texas as a forum for arbitration under the contracts concerned. Seemingly at that time they did not regard Texas as an inconvenient forum - quite the contrary. Moreover one of the post-accident contracts makes Texas the choice of law chosen by the parties. As I have said that contract is not significant in terms of contacts with Texas but it may bear on what is likely to be an undue burden on OPCAL in terms of where they litigate. Standing their connections with Texas I do not think that it would be seriously unfair or contrary to justice if they had to conduct a litigation there. Given that the claimants would certainly have gone to Texas had the settlement not been offered the pursuers were going to be faced with litigation in Texas anyway and they certainly expected this. It follows that in my view on the question of jurisdiction the claimants would have had a very good chance of securing jurisdiction in Texas. The pursuers contended that there was no difficulty about attributing the activities of OBI in Texas to OPCAL. It was specifically provided in the contracts between these companies that OPCAL would assume the rights and obligations of OBI. Moreover the Texas

contracts entered into by OBI provided that the contractual rights and obligations would be taken over by successors. Professor Weintraub saw no problem at all in respect of this matter. Mrs Sondock was of the same view. Mr Greene said that an argument to the contrary effect could be devised but did not seem to be claiming that there was any real hurdle to accepting the relevancy of the OBI contracts. However Mr Kilgarlin did not take these contracts into account in his analysis. 11.4.12. Alter Ego Neither in their pleadings nor in their evidence did the pursuers seek to make a case for jurisdiction based on specific allegations of alter ego. However Mr Silva did claim that in alter ego there was always a potential risk that it would emerge as a ground of jurisdiction. The point was made that the Occidental Group had about 200 companies doing business in Texas. Mr Silva discussed the case of Castanho v Jackson Marine Inc . 484 F. Supp 201 (1980) in which case he had for a time acted. In circumstances not so different from OPCAL's situation an alter ego case had ultimately been sustained. Alter ego was raised as an issue by the plaintiffs in the Busse case but the matter was never decided because the case settled. Nevertheless it has to be noticed that over thirty defendants were convened to the case including each of the consortium members and many companies said to be associated with them. Texan designers were among the defendants and it was alleged that they had contributed to the accident by virtue of design faults. Cases of alter ego were alleged against each of the consortium members. Moreover the case of Lithgow and Others v UTP raised in 1989 in Jefferson County, Texas involved a Mr Lithgow who had been killed in the accident on Piper Alpha. OPCAL and other participants were brought into the action as additional defendants and it was alleged that OPCAL were the alter ego of various companies of the Occidental Group who were active in Texas. Once again the issue of alter ego was never decided since the proceedings were basically to settle certain procedural matters. As I have indicated the pursuers in the present cases have no specific allegations in their pleadings to justify a finding of alter ego At the end of the day the pursuers really confined their reliance on alter ego to the submission that the doctrine in 1988 represented a further risk which they would have required to face had the claims against them gone to Texas. I can accept that the possibility of alter ego founding jurisdiction against them must in 1988 given the Participants a degree of concern. That the matter was a live (albeit open) issue is shown by the way experienced plaintiffs' lawyers raised the question in the two cases I have mentioned. If the issue had gone to decision in these cases the outcome might well have depended on the success or otherwise of the extensive discovery proceedings against the Participants which would have no doubt ensued. 11.5. Forum non Conveniens A matter which received consideration at the proof was whether the Texas Court may have declined to exercise jurisdiction on the basis of forum non conveniens. Given that the accident occurred off the Scottish coast in the North Sea, that the majority of the claimants were Scottish, that Scots law would be the law applicable to the cause and that the main part of the evidence was located in Scotland then clearly there could have been substantial merit in such a plea had it been available to Texas defendants. However in 1988 the relevant plea was not available in the Texas State Court. As from 1990 there could be no doubt that such a plea was not available but even in 1988 although the question at that date may not have been conclusively settled the general (and

indeed correct) view was that forum non conveniens could not be invoked in the State Court. In Chick Kam Choo v Exxon Corporation 486 U. S 140 (1987) in the United States Supreme Court, Justice O'Connor expressed the view that the question of the applicability of forum non conveniens to State Court proceedings was a matter for determination by that court. In Couch v Chevron International Co. Inc.

(1984) 682 S. W. 2d. 534 the Texas Court of Appeals declared that the applicability of forum non conveniens in Texas was an open question. However the attorneys acting for the consortium in the negotiations with the claimants' representatives had little expectation even in 1988 that they could hope to succeed with the plea. They were right in this opinion because in 1990 the matter was conclusively settled when in 1990 the Texas Supreme Court judgment in Dow Chemical Company v Alfaro 786 S. W. 2nd. 674 was issued. That judgment held that the Texas legislature had statutorily abolished the doctrine of forum non conveniens in wrongful death and personal injury actions arising out of an incident in a country different to Texas. It is interesting to note that the preliminary jurisdictional questions in Alfaro took six years to determine. Mr Greene deponed that in 1988 he would have predicted a different outcome for Alfaro but according to Professor Weintraub this was not the general view of Texas lawyers even in 1988. Thus I must conclude that in 1988 the negotiators for the consortium were correct to consider that there was little prospect that actions raised by the claimants in Texas would be displaced because of forum non conveniens although because the final decision in Alfaro was narrow the matter could not be said to be beyond question. 11.6. Quantum 11.6.1. General As I have indicated an important area of dispute in these litigations has been the reasonableness of the settlements, if contrary to the defenders main contentions, the defenders are under a liability to indemnify the pursuers for any loss sustained. Since the settlements entered into by the consortium members were at least to a degree based on values elevated above Scottish levels of damage on the basis that the claimants could have successfully gone to Texas, an important area of dispute as I have discussed above, was the degree to which the pursuers and their predecessors were (if at all) vulnerable to Texas jurisdiction and also the extent of the cover afforded by the indemnities in respect of enhanced values. I have expressed my views on these questions. However another important branch of the defenders' case was to challenge the levels of damages on which the settlements were based - the so-called "Mid-Atlantic Settlement". The crux of the defenders' argument was that even setting aside the question of jurisdiction the consortium had settled at too high a level because allowing for the risks and uncertainties it was unreasonable to anticipate awards from a Texas Court as high as those on which the settlements were based. Of course even if the settlement figures based on a mid-Atlantic view of damages were reasonable from OPCAL's point of view, it is still another question whether the enhanced values would be covered by the indemnities and I have already discussed this. 11.6.2. Choice of Law If the Texas courts had accepted jurisdiction there is a question as to what system of law they would have applied and this arises particularly in relation to the quantification of damages since heads of damages are acknowledged in Texas law which

have no place in Scots law. It was contended by the pursuers that the law both in Scotland and Texas is that if the matter is merely a procedural matter such as the computation and assessment of damages then the applicable law is the lex fori. On the other hand in connection with a substantive matter the applicable law is the lex causae . I was given a reference to Anton Private International Law 2nd Edit. 748-751. In Kendrick v Burnett

(1897) 25 R. 82 it was held that solatium is intrinsic to the claim for damages and not merely evidence of damages. The existence of such a claim therefore fell to be regulated by the lex causae which was English law and not by the lex fori which was Scots law. The same principle was affirmed in the seven judge case, McElroy v McAllister 1948 S. C. 110. In Chaplin v Boys 1971 A. C. (HL) 356 at p381 Lord Guest drew the distinction between heads of damages (which are for the lex loci delicti) and quantification of damages which is for the lex fori. Differences were apparent in the expert evidence as to the degree of control a Texas judge would exercise over a jury in respect of the calculation of damages taking into account Scottish law on substantive matters. Mr Silva was clear that he would not expect a Texas judge to stipulate that particular Scottish ranges of multiplier were to be applied to the computation of pecuniary loss. Mr Fisher who was a Texas Plaintiff's attorney of considerable reputation and experience was perfectly certain throughout his evidence that whereas a Texas Jury would be directed as to what were permissible heads of damages in Scotland, the computation of such damages would be left entirely to the jury. I was asked by the pursuers to accept the figures demonstrating how a Texas jury might assess damages which figures had been prepared by Mr Fisher. It was further submitted that the figures for patrimonial loss provided by Mr Greene were unrealistic and not borne out by experience. Equally on the computation of financial loss Dr Allen's figures and approach were to be preferred to those of Dr Yeager, which were in error. Both Professor Weintraub and Mr Fisher had been provided with a Memorandum of the Scots Law relevant to the damages issues. This had been prepared by Paul & Williamsons and appears in an Appendix to Mr Fisher's Report. This included a copy of the Damages (Scotland) Act 1976 as amended in 1993. The Memorandum was not challenged by the defenders. The heads of damages which may be awarded to relatives suing for the death of a deceased were shown in the Memorandum as Loss of Society, Loss of Support, Loss of Services, and Reasonable Expenses incurred through the death. It was recognised and seems to have been accepted that the Loss of Society element allows an amount for grief and sorrow although in 1988 the legislation did not expressly provide for this. It was contended by the pursuers that there are no rules of law which prescribe how multipliers are to be decided in Loss of Support claims. In Personal Injury Claims it is accepted that Solatium and Patrimonial Loss would be competent heads of damages in Scotland. It was explained in the Memorandum that Scots Law does not recognise punitive damages and the pursuers accepted that such damages could not be taken into account by a Texas Court. Mr Fisher set out the elements of damages that would be available in a Wrongful Death Claim in Texas. These are Pecuniary Loss, Loss of Companionship and Society, Mental Anguish, and Loss of Inheritance (which can be ignored because it is not a head of damages in

Scotland). The Texas Loss of Society and Companionship would be regarded in Texas as corresponding to Loss of Society in Scotland particularly if, as seems to be agreed, grief and sorrow were included. In a Texas Personal Injuries case a number of elements would be allowed as heads of loss. These would be (1) Physical Pain and Mental Anguish (2) Loss of Earning Capacity (3) Disfigurement (4) Physical Impairment (5) Medical Care Costs (6) Loss of Consortium (7) Loss of Companionship and Society (8) Loss of Household Services and (9) Loss of Services. All these would be acknowledged by Scots Law except (6) and (7) It was thought by the Pursuers' experts that the broad areas of similarity between Texas heads of damages and Scottish heads would influence a Texas Judge as to how to direct the Jury. Generally the tendency would be to diverge as little as possible from what the judge (and possibly jury) were familiar with so that it would only be where Scots heads were materially different that directions specific to Scotland might be considered. With regard to the procedure that would be adopted when a Texas case involved damages to be governed in substantive matters by Scottish Law it should first of all be noted that a Texas judge will direct the jury before the attorneys of the parties address them. After the plaintiff's and defendant's attorneys have addressed the jury the plaintiff gets a further opportunity to speak to the jury in rebuttal so that in effect the plaintiff's attorney may have the last word. Moreover the practice in Texas is to allow juries a great deal of latitude in he assessment of damages. With the attorneys addressing the jury last it is only in an extreme case that the judge would intervene and in practice judges are distinctly reluctant to do so. It has to be noted that the American system has a greater tendency to regard juries as completely sacrosanct than would be the case in our own system. Attorneys are given the opportunity to make recommendations as to what the charge contains so that any controversial directions might lead to a measure of debate with the judge. Judges are provided with Pattern Jury Charges. These are essentially directions to Texas judges as to the form of charges and judges would seek to depart from these as little as possible. Judges feel comfortable with the Pattern Charges because they are tried and tested. The judge would not enter into any discussion of the facts with the jury. Relative to our own jury charges judges in Texas would appear to be decidedly succinct. Thus at the end of the day juries are likely to have more scope to pursue their own route to a verdict (and where appropriate an award) than perhaps we are used to. Mr Greene however does remark that there are bounds beyond which attorneys must not ignore the judge's charge and I have no doubt that as a generality that is true. It did not seem to be disputed that attorneys would be allowed to put their own specific figures to a jury. However if the jury were to award more than the attorneys were to ask the award would in all likelihood be vulnerable. An experienced plaintiff's attorney might well seek to circumvent any direction not to introduce punitive damages by putting exorbitant figures to the jury for permissible elements like grief and sorrow although this can be a delicate exercise because it was acknowledged by Mr Fisher that one can lose the support of a jury if figures are asked for which are plainly ridiculous. Mr Fisher indicated that it was good practice to try and give a jury some apparently logical basis for arriving at a figure for nebulous concepts so that with regard to grief, for example ,a jury would be asked by him to evaluate grief per hour

and day. Thus he says that for a serious back injury it may be appropriate to suggest to the jury that they should think in terms of $100 per day for the continuing suffering. This is not an approach that recommended itself to Mr Greene but it has to be observed that Mr Fisher has much more experience of litigating wrongful death and personal injuries claims than does Mr Greene. Mr Fisher claimed that his general approach was not individual to him but employed by many experienced Plaintiff's practitioners. In a case where aspects of Scots Law might be relevant there would be a preliminary hearing so that arrangements for dealing with the implications of this could be decided. For example any questions as to the details of Scots Law would be determined at that stage. Unless it were established that Scotland had different rules from Texas law, that law would be assumed to be the applicable law. Scots Law could be established by Affidavits, Briefs, Treatises or even the testimony of experts depending on the degree of contention. It may be possible to appeal the Court's ruling at that stage. The judge would probably decide that if there was a head of damages not admitted in Scotland then no evidence in support of such a head should be allowed at the trial. However Professor Weintraub was of the opinion that the judge would not tell the jury not to award say punitive damages. The matter would simply not be raised. Mr Fisher, who had experience of preliminary hearings, was of the view that at the hearing the parties would not be allowed to raise questions which were essentially matters of calculation such as Scottish multipliers. He also considered that a Texas jury would not get directions from the judge on multipliers. Professor Weintraub indicated that the Texas jury would not hear the range of damages or levels of awards in Scotland. If any question were to arise as to whether an award of damages was excessive Professor Weintraub would expect the Court to follow local practice. There was a divergence in the evidence as to how a Texas judge would approach the matter of dealing with such Scottish heads of damages as had been defined. Mr Fisher and Professor Weintraub were plainly of the view that the Texas judge would follow the Texas Pattern Charges as much as possible departing from them only if necessary. As Professor Weintraub said the judge would only depart from his standard charge if he could be convinced that it was necessary to do so. He was not cross-examined on this. Mr Fisher went further than this and thought it was "highly likely" that the judge would use a Texas formulation. Where a number of Texas elements were contained in one Scottish head, or the reverse, he would use the Texas system and not distinguish the Scottish elements separately. Indeed if he did diverge from the Texas Pattern he would not specifically refer to Scottish practice at all but simply give the varied direction. However he did agree that the greater the number of separate elements the jury is asked to consider the higher the total damages are likely to be. Mr Greene took a different view and thought that the Texas judge would seek to define the Scottish elements as accurately as he could. Thus according to Mr Greene the judge might well define Loss of Society simply by giving the definition in the Scottish statute. This could be important because the statute in that case for example contains no reference to grief and sorrow. However it has to be observed that Mr Greene had no experience of dealing with pre-trial Hearings on such questions while Mr Fisher had such experience. In addition even Mr Greene accepted that a Texas judge would seek to interfere with the

jury's function in assessing damages as little as possible. 11.6.3. Values of Prospective Awards - General There was a clear divergence in the values of the claims which Mr Fisher and Dr Allen advanced on the one hand and those advanced by Dr Yeager on the other. On this aspect of the case Mr Greene's approach was very much to adopt and support the methodology and results of Dr Yeager. In any event the approaches of Mr Fisher and Dr Allen resulted in much higher figures than those of Dr Yeager although Mr Fisher for his part was lower than Dr Allen. Mr Fisher's approach which was relatively simple was (in relation to financial loss) to take the gross wage and multiply this by the difference between the age of the victim at death and the age of 65 (when he assumed that in the absence of the accident he would have left work). He assumed that the growth of the fund gained by early payment would approximately be cancelled out by inflation. Dr Allen's methods were more complicated and the pursuers' submission was that at the end of the day they were more scientific. Mr Fisher had at the beginning sought to evaluate all the claims so that he required a method that would be relatively straight-forward and which could be applied across the board. Mr Fisher was later asked to focus on the test cases and he dealt with these seven cases in two reports dated 9 January 1993 and 25 January 1993 respectively. In deriving the values of claims he used for loss of earnings a per diem approach and this was done on the basis of Hernandez v Baucum 344 S. W. 2d. 948 (1961). In that case which was determined by the Court of Civil Appeals of Texas it was decided that it was not erroneous to exhibit to the jury a chart breaking down the pain and suffering, loss of time and earnings, and medical expenses into time periods, and suggesting amounts to be awarded therefore constituted arguments about the evidence. The defenders in the present cases did not challenge Hernandez . Mr Fisher's analysis of the Robert Carroll case was used to illustrate aspects of his methods. In respect for loss of Society and Companionship he worked on the basis that each day over which this would be endured should be compensated at the rate of $66. Mr Fisher claimed that he could have allowed a higher daily rate but $66 represented a reasonable average based on his experience. That rate represents a yearly loss of about $ 24,000. In the case of Loss of Society, Mr Fisher would work on dates for life expectancy rather that length of working life and taking the fact that Mr Carroll was said to have had the expectation of living until the age of 78 this leads to a multiplier of 44 and a total result for this element of loss of $1,056,000. He would expect a plaintiff's attorney to present each case to a jury in the same way. He had in arriving at his figures attempted to strike figures which a Texas jury would consider to be reasonable. He had sought to scrutinise about 50 actual cases but fundamentally he had based his figures on his own wider experience. With regard to claims by children for Loss of Society and Companionship, Mr Fisher had allowed them loss at the same rate as a widow until they reached 18 years but thereafter he reduces the rate allowed until the child would reach 21 years whereafter it is reduced further. Most of the decedents were relatively young and Mr Fisher agreed that were he dealing with older people he might have modified his approach. Mr Fisher claimed that his rate of $66 did not incorporate a punitive element and that even although the jury might not be directed to consider such an element there was in Texas always the chance of a runaway award so that

a jury could well award higher than his figures. Mr Greene while accepting that a per diem approach would be competent is of the view that it does not always work. Sometimes the jury feel that it brings out an excessive amount and they use a lump sum approach. Using Mr Fisher's approach in Robert Carroll in relation to children each child would receive $24, 000 annually until the age of 18 and then $18,000 annually until the age of 21. From 21 until the notional life expectancy date of the deceased, (78), the child would receive $10,000 yearly. In Texas a jury will commonly recognise a continuing close bond between a child and parent even when the child has left home. Mr Fisher indicate that he would also expect a parent to be awarded Loss of Society and Companionship at the rate of $10,000 per annum for the period up to 78 years less the age of the parent (unless the parent was over 78). Although a defendant could argue that a lump sum may produce more than the annual loss to the claimant this would be left entirely to the jury. In general in Texas claims by parents fall into the range $300,000 to $600,000 although individual awards are of course fact specific. With regard to the mental anguish of the parent Mr Fisher does not use a per diem approach and he believes that $200,000 would be a reasonable average for this element. In his experience the element could range from $100,000 to $5,000,000. Mr Greene for his part accepted that some awards will be extraordinarily high but equally many awards are on the low side. Unlike Mr Fisher he expected that there would be a single space in the Pattern Charge for Loss of Society and Companionship. He would expect there to be highly competent lawyers not only on the plaintiffs' side but also on the defendants' side. Had he personally been appearing for the defendants he would have admitted liability to minimise prejudice. In respect of quantification of Loss of Society Mr Greene relied to a degree on experience although he conceded that he had less experience than many in wrongful death cases. He had never taken a case involving foreign workers to Trial partly because so many of such cases settle. He did not agree with Mr Fisher's assessment of Loss of Society for Robert Carroll's widow. Whereas Mr Fisher's figure for the element of Loss of Society under the Scottish approach amounted to about $1,200,000 and $900,000 for the child Mr Greene thought that a reasonable award for them in Texas would be $400,000/500,000 for the widow and $200,000 for the child. He considered that Mr Fisher's figures were a worst case scenario recoverable only in the exceptional case. Mr Greene accepted that he had some experience of cases with substantial awards. In one case involving a plaintiff who sustained injuries when he slipped the jury had originally awarded an amount which including interest was about $6,000,000. An application for a new trial was successful because of some technical problem and the case settled for an unknown amount. In another case the award with punitive damages was about $12.4 million. The accident had been in 1982 and the award was not obtained until 1994. A motion for rehearing was allowed but only on the question of punitive damages. Mr Greene accepted that the number of cases in which the Court disturbed jury findings of damages based on excessiveness was small. Another case which the pursuers cited to me on the matter of quantum of loss was Larsen v Delta Air Lines Inc . 692 F. Supp. 714 (1988). In that case the surviving spouse and parents sued in respect of the death of the deceased following a plane crash at Dallas, Texas in August 1985. The case was taken in the Federal

District Court before a single judge rather than a jury and this was because of a trade-off following an admission of liability by the defendants. The deceased Larsen was 32 years of age and had no children. He had married Carol Larsen, aged 31 at the accident, on 28 December 1975. At the time of the accident his father was 61 years old and his mother was 62. The judge, Mrs MacDonald, who was generally regarded as rather liberal, awarded Carol Larsen $500,000 for Loss of Society and Companionship and a further $500,000 for Mental Anguish past and future. Each parent was awarded a total of $400,000 for the same elements of loss. This case was being looked at closely by OPCAL and the Participants' interest at the time of the settlement. Indeed Mr Napier, a representative of the PADG, specifically asked during negotiations if the Larsen case had been considered. It was submitted to me that it is much closer in its awards to the amounts suggested by Mr Fisher than those suggested by Mr Greene. Under Mr Greene's assessments he would have awarded the parents only $50,000 each. I was asked to compare the awards in Larsen with the figures which Mr Fisher allowed in his Report in respect of the death of Neil Pyman, (a deceased in one of the seven test cases). Mr Pyman's mother was aged 58 and Mr Fisher allowed her $ 200,000 for Loss of Companionship and Society and a further $200,000 for Mental Anguish. This compares with the equivalent award in Larsen although the apportionment is slightly different. The father of the deceased received in Mr Fisher's calculation a total of $380,000 for the said elements. Mr Pyman was aged 32 when he died and Mrs Pyman was aged 30 so that again the age structure is similar to that in Larsen . Mr Fisher allowed her $1,104,000 for Loss of Companionship and Society and $ 200,000 for Mental Anguish. Indeed Mr Fisher's figures compare quite well with Mr Pyman's case given the similarities between the two cases. Even in respect of pecuniary loss the cases are not dissimilar. The deceased Pyman earned about $43,000 gross whereas Larsen earned $36 000 plus a 17% to 20% bonus. Mr Fisher deducted 21% from his Pyman calculation for personal consumption whereas in Larsen the Court deducted 30% for this element but Mr Pyman (unlike Larsen) had a child. Both Mr Fisher and Judge MacDonald in Larsen come out with figures for pecuniary loss of about $1,100,000. The figure which Mr Greene/Dr Yeager estimated as the pecuniary loss in the Pyman case was in fact about one half of what the Judge awarded for this element in Larsen which alone may suggest that these figures tend to be too conservative. It has to be noted that in Larsen the award was of a judge which in general would produce a lower award that a jury (although Mr Greene thought that the particular judge was inclined to be generous). However the Consortium's representatives considering Larsen in 1988 may have been nervous about concluding that the judge was unduly generous. Moreover with a jury determining damages there was always the decided risk that a jury would have taken into account in respect of mental anguish that the deceased had been killed in particularly horrible circumstances. It was made abundantly clear to me in the evidence that it cannot be taken for granted that a Texas jury will always act with a lawyer's logic. Mr Fisher thought it likely that each claimant would sue separately and he considered it a risk that if the first cases to be decided resulted in run-away awards this would set the bench-mark for awards in all subsequent cases. Whereas defence lawyers like Mr Greene would try to keep the

more horrific aspects of the disaster away from the jury, given the skill of Texas plaintiff's attorneys, it was perhaps unrealistic to assume that this tactic would succeed. Indeed Mr Greene accepted that it was at least possible that a huge disaster case such as Piper Alpha could result in relatively large awards. Mr Greene thought that children would be given awards in the range of $200,000 and he made no allowance for the ages of the children. However he had no experience of the matter in wrongful death cases to back up his estimates. Mrs Sondock gave some general views on the amounts awarded by Texas juries but I think senior counsel for the pursuers was right when he contended that the critical conflict between the legal experts on the amounts to be expected was that between Mr Fisher and Mr Greene. With regard to the element of financial loss Mr Greene did not produce any of his own figures but adopted the evidence of the defenders' economist Dr Yeager. Mr Fisher on the other hand gave specific figures in his Report. Mr Fisher's approach was to gross annual earnings and multiply these by the difference between the age of the deceased at death and the projected date of retirement. He made a percentage deduction for the personal consumption of the deceased and he evolved a formula for the allocation of the earnings loss among members of the family. Mr Fisher's approach was less sophisticated than would be used by the economists but that in a sense was its strength because his experience was that it would be understood and readily applied by a jury. Thus Mr Fisher used the offset approach whereunder he maintained that discount rates and increases in future earnings would cancel itself out. The defenders claimed that he had given no detailed figures to justify this approach. Indeed Dr Yeager claimed that the validity of the offset method depended on the use of the proper discount rate and a proper assessment of future increases in wages. He sought to show that this is what Mr Fisher failed to do. It may well be that Dr Yeager's more elaborate approach would appeal to a professional economist but Mr Fisher does not pretend to do more than to search for a simplified presentation that his experience tells him a jury will find intelligible, sensible, and will feel prepared to act upon. Mr Fisher's approach could be illustrated by the Robert Carroll case. Mr Carroll was 34 years old when he was killed and his normal retirement age was 65. He was earning a gross salary of $29,699. Mr Fisher deducted 21% of salary for Mr Carroll's personal consumption. This brought out a total salary loss of $737,329 of which he allocated to Mrs Carroll 70% namely $509,130. It has to be noted that in the case of divers Mr Fisher considered that their active life as divers ended about the age of 45 so that between the ages of 46 and 65 he only allowed them 50 % of their diver's wage. The amount he allowed for personal consumption varies with the size of the family of the deceased. These allowances were based on the advice of Dr Allen and his own considerable experience. He allowed 40% if there was no surviving spouse or children, 30% if there was a spouse or children (but not both), and 21% if there was a surviving spouse and one child. Further reductions in the personal allowance factor were made as the size of family increased down to an allowance of 8%. The computation of deductions for personal consumption were not challenged with Mr Fisher. His deductions for this factor have to be contrasted with those of Dr Allen who on the basis of his own experience worked on the basis of figures that ranged between 20 % and 30%. Mr Greene did not advance any figures

of his own in respect of personal consumption and Dr Yeager's assessments of this factor were not put either to Mr Fisher or Dr Allen since he was not instructed until some considerable time after they had given their evidence. Mr Fisher assumed that the amount of inflation and the advantages of early payment would be approximately equal. It has to be noted that it is the practice in Texas to look at gross earnings in relation to loss of earnings and not the net figure as would be done in Scotland. There is therefore a question as to whether Texas Law would regard this as a substantive matter to be governed by the law of Scotland or a procedural question involving computation to be decided according to law or practice in Texas. Neither Mr Fisher nor Professor Weintraub was certain as to how a Texas Court would deal with this problem. Indeed I was given no authoritative help as to how a Scottish Court would classify the matter. I was however referred to Professor Anton's book on Private International Law , 2nd Edition and at page 749 the author states that: "under the common law of Scotland while the liability to pay damages for a particular type of injury or loss is a matter of substantive law governed by the lex causae of the obligation, the quantification of these damages, the modalities of their payments and the liability for interest upon them are matters for the lex fori ". On such a matter Professor Anton's views are entitled to respect. Without arriving at a conclusive view I would be inclined to think that the gross/net question goes to remedy rather than right. That is to say it does not touch upon the matter of a distinct right to compensation but is essentially a matter of computing the level of damages awarded. It is however a matter for the Texas Courts to decide how they tackle the problem. If as I was led to believe a Texas Court would regard the selection of multiplier as a matter of computation rather than law it is difficult to see why the court would otherwise regard the selection of an appropriate earning rate to apply. Mrs Sondock, an experienced first instance jury judge, said that with regard to the earnings' rate she would regard this as procedural but in any event would say nothing at all to the jury. She said that a State judge would never tell a Texas jury how to calculate an earnings' loss and I am inclined to accept that. Mr Greene thought that a Texas judge would not only direct a jury to deduct tax but also national insurance contributions. However as I have already observed Mr Greene had not the same direct experience of Texas judges as was the case of some of the other witnesses and of course he did not have the practical experience of Mrs Sondock. Given the Texas Courts' tendency to leave much to the discretion of the jury in arriving at damages I should think there was undoubtedly a distinct risk that the calculation of an earnings rate would have been left to the jury. It may seem difficult in the eyes of a Texas judge to make decisions about the proper deductions to make in respect of British taxes and insurance contributions (which matters may raise many questions for a judge unfamiliar with such considerations) and this could help to prompt the judge to opt for the Texas practice of keeping matters as straightforward as possible before a jury. In any event I doubt if this matter on its own was sufficiently material to bring levels of damages anywhere near Scottish levels. It should also be noted that when the economist, Dr Allen, gave his evidence he pointed out that if one works with net earnings figures and the multiplier covers an extended period the ultimate capital sum is sometimes greater than working with gross figures because if his

methods are used it is also necessary to allow for deducting tax in computing the discount rate for premature payment which is related to estimated interest returns. Comparative figures were produced by the pursuers showing the various amounts brought out by witnesses for the victims named in the seven test cases. In relation to the deceased Robert Carroll he was a Safety Operator and, as I have already indicated, aged 34 at death. He left a wife and daughter but his parents were dead. In the Schedule produced there are columns to indicate (1) the amounts assessed by Mr Fisher (2) the amounts assessed using Mr Fisher's figures for non-patrimonial loss and Dr Allen's figures for the patrimonial loss, and (3) the amounts respectively supported by Mr Greene and Dr Yeager. In respect of Mr Carroll, Mr Fisher's total estimate (once interest is added) is £2,006,902, the Fisher/Allen total is £2,250,529 and the Greene/Yeager total is £766,941. The discrepancy in the totals between the two competing sets of totals is considerable and would hardly be expected in an equivalent exercise involving British awards. I should say that the totals were initially expressed in dollars and then converted into pounds sterling. The rate of exchange employed was $1.70 to the £1. There was a measure of dispute as to the appropriate exchange rate to employ. Mr Brice, a statistician said that the exchange rate in October 1988 was $1.68-1.70. Dr Allen said that the exchange rate in 1991 (when the claims might have gone to trial) was again $1.70. Dr Yeager indicated that the appropriate exchange rate was the average up until July 1991 which was $1.65. I cannot see any unreasonableness in the negotiators in 1988 working on the basis of the exchange rate at the time. After all nobody at that time could have forecast precisely how the rates were going to move. With regard to interest in Texas pre-trial interest is paid from the expiry of 180 days after the death. Thus if the trial is expected to take place three years after the incident pre-trial interest would be due for three years less 180 days and at the fixed Texas standard rate of 10%. The Texas approach to quantifying the period of interest was employed in the settlements but the rates paid were the Scottish rates which were more conservative. Of course if the claimants had litigated in Texas they would have become entitled to enjoy interest as calculated in Texas. In relation to the settlements once claims were vouched the settlement figure with interest to date was consigned in a bank. Thus sometimes there was delay in releasing the settlement sum to the claimant because for example in some cases Arbitration was required. In such cases the interest question was dealt with by handing over the interest earned in the bank. Thus in the present case the pursuers are seeking to recover only the actual payout net . Of course it also has to be borne in mind that any award achieved in Texas would have been subject to a contingency fee of perhaps 30% or more. In the case of the Carroll death the actual gross payout was £781,945. The total figure estimated at Scottish levels was £231,750. Thus the Carroll family recovered substantially more than they would have expected in Scotland and more than they would have recovered in Texas if the Yeager/Greene figures are correct (especially after allowing for the deduction of a contingency fee). On the other hand they recovered much less than they would have recovered in Texas according to Mr Fisher and Dr Allen namely upwards of £2,000,000 less contingency fee. In the cases involving the deceased William Cowie, Graham Whyte, Michael O'Shea, John Duncan, and Neil Pyman again substantial

differences are shown between the figures of the pursuers' experts and those of the defenders. On the other hand it is plain that the actual settlements are materially less than might have been expected were the claimants to attain the values estimated by Mr Fisher and Dr Allen, perhaps corresponding to the view of Mr Silva that the claims were settled for at least about 30% to 40% less than what might have been reasonably anticipated in Texas. It must be stated that the calculations on which Mr Silva based his estimate of Texas values were not those of Mr Fisher but calculations prepared in his office with the help of an economist. Mr Fisher for his part when he prepared his assessments of values did not know the actual settlement figures. It has to be noted that in the case of Graham Whyte the person living with the deceased at his death was not a wife but a co-habitee. Because of this factor Mr Fisher assigned to the lady less damages than what spouses were receiving which accounts for the fact that his figures in that case may seem relatively low. In any event Mr Whyte was older than the other test case victims at 42 years old. Thus he attributed to June Hunter, the co-habitee, $100,000 for mental anguish rather than the figure of $200,000 allocated to wives. Mr Greene confirmed the view that a co-habitee would expect less than a wife because she did not enjoy the benefits of formal matrimony. As well as being referred to the case of Larsen I was referred to a compilation of Texas jury awards contained in a series of documents known as the Blue Sheets. I did not find the Blue Sheets very helpful. The reports of the cases are short and contain limited information. One therefore cannot be sure that one is comparing a situation comparable to the actual cases before the Court. Moreover many of the cases containing particularly large awards had been appealed and then settled with the settlement figures not being shown. However it can be said that I was not shown information from these sheets to suggest that the estimates made by Mr Fisher or used by Mr Fisher were high and indeed it was obvious from the Sheets that on occasions Texas juries at first instance are capable of making extremely high awards. Moreover Mr Price, a statistician who had prepared spreadsheets setting out the claims during settlement negotiations, also gave some evidence about some information on Texas awards that he had collected. For the reasons which as I have said affect the usefulness of the Blue Sheets, Mr Price also conceded that his information had to be looked at with care. However again the general level of awards seems to be materially above Scottish levels. Mr Fisher in arriving at his own values relied mainly on his personal experience but he was also kept in touch with awards by material he received from time to time from Jury Verdict Research Reports (not only from Harris County but nationally), from information from the American Trial Lawyers' Association Journals and from the Inner Circle of Advocates (of which he is a member). The case of Andrew Carroll differs from the others because he was a survivor and claimed in respect of his injuries. Mr Carroll received an injury to his hand but essentially it was a Post Traumatic Stress Disorder (PTSD) case. Mr Fisher's total value for this claim was $1,368,864. In approaching the survivor claims Mr Fisher worked on a notional trial date of July 1991. He ranked the personal injuries claims as low, moderate, and severe. He considered Mr Carroll's case as severe and for past mental anguish he awarded him $250,000 which is the sum he allowed for injuries of that description. He only allows

$21,600 for the past physical pain that he considers to be relatively slight. By Texas standards the sum allowed for physical pain was low. He allows him for mental impairment the sum of $64,800. He also allows him $324,000 for future mental anguish and the same sum for future physical and mental impairment. These sums are arrived at by categorising the future anguish or impairment as low and then multiplying the annual factor for that category ($7,200) by the years brought out by life expectancy. However Mr Fisher approaches these elements on a per diem basis but claims he does that to provide a logical way forward for the jury but that the sums brought out are the sums he would expect no matter how the jury approach the problem. Mr Fisher had been provided by Mr Price with information covering the accident experiences of the injured man, the medical view of his injuries, his personal circumstances and employment position. The injuries position of survivors was vouched by Arbitration proceedings (at which evidence was led). The object of these proceedings had been to ascertain an award of Scottish damages to which the agreed multipliers were applied. This had been done on the case of Mr Andrew Carroll although Mr Fisher had not been sent the Arbiter's Report. Mr Coutts Q. C., the arbiter, had determined that at the time of the arbitration Mr Carroll did not seem to be significantly impaired and he had awarded him solatium of £6,000. To accord with the settlement agreement this sum had to be multiplied by 12 to give the final settlement figure for this element of damages. Mr Coutts proceeds to award the sum of £105,000 for future wage loss and £35,000 for past loss. The award of Scottish damages made by the Arbiter would have totalled £157,350 (which includes certain minor items in addition to those mentioned above). When enhanced in terms of the settlement this represented damages of £384,700. It may appear that Mr Fisher had over estimated the severity of Mr Carroll's PSTD. However in his evidence he makes it clear that he is not paying particular attention to the degree of individual cases because the condition is difficult to assess and cases will balance out, but what motivates him is the view that no Texas jury would award less than $250,000 for past mental anguish for a person who had gone through the experiences suffered by Mr Carroll in the accident. In calculating loss of future earnings Mr Fisher assumes a reduction in earnings of 25% for low future disability, 50% for moderate disability and 100% for severe future disability. He also assumes that the earnings of a Diver would diminish between the ages of 46 to 65. With the future factors rated as low, a figure of $224,103 is brought out and this leads to a total assessment by Mr Fisher of damages of $1,531,453 or £999,855. Mr Greene and Dr Yeager when they consider the Andrew Carroll case arrive at substantially lower figures than Mr Fisher. Their total for the case (excluding interest) is stated as $351,686 as compared with the total of $1,531,453 brought out by Mr Fisher. The actual gross payout under the settlement was $658,510. On the other hand if Dr Allen's calculations for financial loss are added to the non-pecuniary loss estimated by Mr Fisher a total of $1,714,038 is derived which is even higher than Mr Fisher's figure. In Carroll, Mr Greene said that he would estimate the solatium as $100,000 but this seems difficult to reconcile with his relatively limited direct personal experience of jury awards where in the two cases he mentions Carter and Maritime Overseas Corporation the damages actually awarded seem to be substantially over Scottish levels. I

was also asked to consider the actual settlement values in the Busse cases which was settled in Texas. The total settlement was $5,700, 000 made up of $1,500,000 to the child , $3,500,000 to the widow, and $ 375 ,000 to each parent. This settlement appears to be at significantly higher levels than a Scottish Court would have awarded. Mr Busse was aged 31 at his death, was a directional driller and was earning $60,000 per annum. Some parts of the Busse case took an extended period to settle and the widow's claims were not settled until 1992. 11.6.4. Value of Prospective Awards - Economists Each of the parties brought an Economist to give evidence on the computation of financial loss in the Texas Courts. In addition there was the evidence of Mr Fisher. His method of dealing with financial loss was relatively straightforward and designed pragmatically to be readily adopted by a jury. I have already indicated how he proceeded in relation to the test cases. The Economists Dr Allen and Dr Yeager each adopted a more analytical approach. However they accepted that Mr Fisher's method could be put to a jury perfectly properly. Dr John Allen the pursuers' expert is Professor of Economics at the Texas Agricultural and Mechanical University. He graduated with a degree of Business Administration in 1958 and obtained a Master's degree in 1963 and a Doctorate in 1966. After a period teaching at Texas A & M University he was appointed Professor there in 1978. He also acts as an Economic Consultant but more particularly has acted as an expert witness in litigation for 20 years. He has appeared in Court about 100 times. About 70% of his work is for plaintiffs. He has often appeared with Mr Fisher. He has written a number of publications on the causes of inflation and the relationship between inflation and interest rates. Dr James Yeager was aged 48. He is a Business Economist with the firm of Schwarz and Yeager, Houston. That firm provides Litigation and Economic Services. Mr Yeager graduated in Economics in 1970 and obtained a doctorate in 1973. From 1974 to 1977 he was an Assistant Professor at Auburn University, Alabama. In 1977 he became a Corporate Economist with the Goodrich company in Ohio. He was then involved in Economic forecasting and continued teaching part-time at Auburn University. In June 1979 he became Chief Economist with McDermotts in New Orleans. That company built offshore platforms. His responsibilities involved economic and financial issues. In 1991 he left McDermotts and started Yeager and Associates in New Orleans. In 1993 he moved to Houston where he joined Schwarz to form Schwarz and Yeager. Initially after joining his present firm he was involved in establishing the firm but by the time he gave his evidence he had been involved in about 50 personal injuries and wrongful death claims. However he had only twice given evidence in Court. Because Dr Yeager was first instructed long after Dr Allen had given his evidence, his views were not put to Dr Allen. In particular it was not suggested to Dr Allen that he ought to have used a wage earning factor where the future rate of wages was less than the discount rate. The pursuers actually at the time of Dr Yeager's evidence objected to it on the ground that his methods had not been put to Dr Allen but I allowed the evidence in under reservation. Dr Allen did his calculations for the cases of Robert Carroll and Andrew Carroll. He calculated on a gross earnings basis and adjusted for taxation. He used a single rate of tax. He provided figures for loss of household services. Whether he extended his calculations to the age of 60 or 65, and whether his figures were taken gross or adjusted for

tax he always produced a higher figure than Mr Fisher. Indeed Mr Fisher said that had he been acting for the claimants he would have used an Economist before the jury. Dr Yeager calculated pecuniary loss for each of the test cases and did so on earnings computed on an after tax basis. He always came out with lower figures than either Mr Fisher or Dr Allen. Dr Yeager considered that Mr Fisher's "offset method" of calculation could be put to a jury but he was not too impressed by this method. He considered that it produced results that overstate the level of losses. This is because the average rate for increases in wages in vastly less than the discount. Dr Allen on the other hand said that he often recommends the "offset method" be used with a jury because it is simple and reasonable. However in practical terms he considered that the results attained with this method were too conservative. Although Dr Yeager said that he would use a wage earning factor he never said that this was ever done in practice. Dr Allen proceeds by way of considering the date of the accident, the age of the victim at the time, and his life expectancy. He uses Government Tables of life expectancy but observed that it would be open to a jury to elevate the stipulated age if they saw fit. In relation to work life expectancy he also has Tables which he applies for this. These Tables take into account and average out relevant factors such as redundancy. He will, however appraise earnings loss up to the age of 65 irrespective of the Tables because he considers that it is reasonable for an individual to aspire to work beyond a lower age. In the present exercise he divided earning rates into the likely rate pre-trial and a post-trial rate. In the pre-trial rate he tried to take into account the likely changes in earnings before the estimated date of the trial. This in some cases could even result in a fall in earning rate. He made an adjustment for the personal consumption of the victim. With regard to post-trial earnings Dr Allen took the earnings to the date of the trial and projected the relevant rate into the future based on a growth factor for the whole of the remaining work expectancy. The Growth Factor is based on the difference between the rise in wages and inflation so that it represents real growth. He considers that the loss must be assessed on present value. This is the sum which if paid today and put to work at interest would allow the claimant to replace the notional earnings so that at the end of the work life period the capital represented by the damages would be used up. Thus he in effect discounts the damages to their present value whereas Dr Yeager applies a specific discount rate. Dr Allen considers that the claimant should never be presumed to be prepared to invest in other than the safest of securities. This in effect means short term government securities because the claimant should not be expected to be prepared to lock up capital for more than 90 days. His approach, if validly conceived, eliminates the problem of premature receipt of earnings. To compute the appropriate rate of interest Dr Allen takes the historic rate of interest since 1965. In the personal injury cases no allowance is made for personal consumption because of course this will continue. In the Robert Carroll case Dr Allen took the notional trial date as being in July 1991 so that he has pre-and post-trial earnings loss. Mr Carroll had a life expectancy of 72. His work life expectancy was 31 years to 65 or 26 years to 60. The pre-trial loss he derived from Mr Fisher who had made an estimate of what had happened in the United Kingdom. After adjusting for taxes at an average rate of 30% he came up with a total of £36,000 which

compares with the £34 ,000 which Dr Yeager came up with for the same loss so there is no significant difference there. Nevertheless it has to be noted that Dr Yeager in arriving at his figure had taken into account an element of household services but deducted a larger amount for personal consumption. In respect of future earnings loss Dr Allen using his methods (discounting for personal consumption and discounting at present value) came up with a figure of £586,000 to the age of 65. His figure when adjusted for taxes is £688,000 which is higher but arises because he has to take account of tax on the interest that will be earned. The Growth Rate he used was 2.3% which was not challenged in cross-examination. In his calculation for Robert Carroll at the age of 60 he comes out with a figure of £518,000 unadjusted for tax which becomes £520,000 when adjusted for tax. In his calculations Dr Allen both in relation to the discount rate (the future rate of interest to be applied to the income stream) and the income stream itself (the future growth of wages) worked with real rates which were both net of inflation. Thus he does not require to take account of inflation at all. In calculating his discount rate he looks at historical rates of interest and arrives at a rate which is the real rate of increase over inflation. Because he uses such a real rate he protects the fund against erosion by inflation. He in fact applied the three months Treasury Rate for the period 1961-1991 which he is taking as the standard minimum risk. This means of course that he is assuming that the capital is re-invested and rolled over every three months. Dr Allen was of the view that the net interest rates he calculated were realistic. He accepts that it would be possible to find investments that have paid a higher return than Treasury Bills but he thought that such could take the claimant into an unacceptable degree of risk. I can certainly see the force of the opinion that the claimant may be a skilled or unskilled investor and it should not be assumed that he is the former. Therefore issues between Dr Allen and Dr Yeager were in the event what is the appropriate real rate of growth of wages and what is the appropriate real rate of return on investment which should be applied. Dr Allen as I have said made an allowance in each case for the personal consumption of the deceased and the rate he applied varied with the structure and size of the family. Indeed he had provided Mr Fisher with figures for this deduction. These deductions were not challenged in the cross-examinations of either Mr Fisher or Dr Allen. I was referred to a case said to contrast the approaches used by the two economists namely Culver v Slater Boat Company 722 F 2d 114 (1983). This case was a federal case that was decided by the Court of Appeals. It was held that fact finders must adjust damages to account for inflation according to below-market discount rate methods (the Court refers to fact finders because unlike the State Court situation many federal cases are decided by judges). The Court refers in its decision to three methods of adjusting damages awards to account for inflation. The first is the below market discount method where (as explained by the Court) the fact finder does not attempt to predict the wage increases the particular plaintiff would have received as a result of price inflation. Instead the trier of fact estimates the wage increases the plaintiff would have received each year as a result of all factors other than inflation. The resulting income stream is discounted by a below market discount rate. This discount rate represents the estimated market interest rate adjusted for the effect of any income tax, and then offset by the estimated rate of

general future price inflation. This seems to be the method that Dr Yeager applied. However the Court acknowledges that this method does present certain difficulties. It states that providing an appropriate below-market discount rate is a problem because Economists do not yet fully understand the relationship between discount rates and interest. However it is observed that estimates uniformly fix its amount over any fairly lengthy period as falling into a range that runs from 3% to a negative rate of minus 1.5%. This range of rates will be accepted and not reversed if there is a reason for choosing them. The second method does not affect this case and in any event seems to have been criticised because it used nominal figures rather than real figures. The third method recognised was described as the total offset method where future wage increases, including the effects of future price inflation, are presumed to offset exactly the interest the plaintiff would earn by investing the lump sum award and neither discounts the award nor adjusts it for inflation. This would appear to be the method that Mr Fisher uses. Mr Allen's experience was that in the State Courts gross wage figures are always used rather than net. As I have already observed Dr Allen's view was that when extended periods are involved a net procedure will sometimes throw up a larger capital sum than working with gross wages because of the need also to deduct tax from the interest payments taken into account in the early payment discount. American Courts of course seem to work with much higher multipliers than would be permitted in Scotland. Dr Yeager's methods were quite different to those of Dr Allen and bring out substantially lower figures. The starting point of his analysis of Mr Robert Carroll's pre-trial loss was the earnings figure for the year of the accident. Then he deducted tax and National Insurance Contributions . Dr Yeager then took off a personal deduction factor at the rate of 35% (to be compared with Dr Allen's deduction of 21% for a three person family) but he also made an addition of a figure for household services. He then increases the wages by three elements namely inflation, productivity increases, and an age earning factor. Using this method he comes up with a figure for pre-trial loss of £34,797. The disparity between the experts at this part of the calculation is not great and may be attributable to the 10% difference in the personal consumption deductions. With regard to the post-trial loss the differences between Dr Allen and Dr Yeager may be due in part to the fact that Dr Allen employs a real growth rate in earnings of 2.3% whereas Dr Yeager applies what he describes as a productivity increase of only 1.5 %. Dr Yeager also thinks it appropriate to work into his earnings loss a wage earnings profile which is an attempt to allow for the fact that a person's earning capacity will vary with age. Dr Yeager begins his post-trial loss calculation with the presumed wage for the year April 1991 to March 1992 (the year during which it is assumed the trial would have taken place). This is taken to be £23,135. He then computes a figure representing this continuing loss from age 37 until age 59. This is done on an after-tax basis; and national insurance contributions and personal consumption are also deducted. Thereafter Dr Yeager applies a discount rate to allow for early payment but on a quite different basis to Dr Allen. With his method he arrives at a total loss of earnings of £271,264 adjusted for tax. For the same matter Dr Allen calculates £520,000 and this sum does not include loss of services so that it will be seen that the differences between the

experts are anything but nominal. It must also be noted that the conversion of the dollar figures originally calculated into sterling also results in a disparity because Dr Yeager uses a conversion rate of 1.65 dollars per pound instead of the 1.7 used by Dr Allen. Dr Allen used Government tables in assessing work life expectancy but he would leave the actual decision about this to the jury producing figures to the ages of 60 and 65 respectively. Dr Yeager is concerned to refine work life figures and uses Work Life Tables prepared by the Bureau of Labour Statistics of the United States. These statistics apply to United States workers. They purportedly are based on the median number of years a worker of a particular age, sex , educational attainment and race would be expected to work. On this basis he comes up with a figure of 25.56 years of work life expectancy for Mr Carroll compared with Dr Allen's higher alternative of 31 years. Dr Yeager's use of these tables was criticised. He seems to have opted for a table which relates to all workers white and black while if he had used another table which applied to white males alone he would have got a longer working expectancy. Moreover the table used by Dr Yeager related not only to full time workers but to part-time and seasonal workers. It was suggested that there were few if any black males among the Piper Alpha victims and also no part-time workers. Of course Dr Yeager's experience may have related to different social conditions. Indeed he indicates that no one had given him information that Robert Carroll was a white male. He claims that he used the mixed race table because it relates to a whole population and was therefore likely to be more comprehensive. Moreover he does not seem to have known that Robert Carroll had a Higher Leaving Certificate that would have taken him into a higher educational category in the Tables. A question is certainly left as to why Dr Yeager seeks to present such a finely tuned approach to the prospective jury but in fact departs from it when it come to selecting the appropriate Table. However it has to be acknowledged that the differences between the Tables are relatively slight. A further point made by the pursuers is that since the Tables were published legislation has been passed in the United State making it illegal to retire employees compulsorily at the age of 65. What difference, if any this would make to the Tables was not made clear. In computing his wage growth factor Dr Yeager also worked on what he considered to be a real growth in wages although he called it a productivity factor. In addition he uses an age profile to calculate how earnings will fluctuate with age. Moreover he takes inflation and taxes into account. His productivity factor was 1.5 % to be compared with Dr Allen's growth factor of 2.3%. Dr Allen's figure was based on a consideration of actual wage rates over the period 1965 to 1991 which he considered to be a representative period of the earnings spectrum. He was also working on net figures which took inflation into account. Dr Yeager predicates his opinion upon an economic analysis of the British economy during the interval between 1975 and 1994 and on the view that earnings subside as the worker grows older. Unlike Dr Allen's figures for earnings growth Dr Yeager's growth figures seem to be based not only on the statistics for the relevant period but an application of his economic expertise and judgment to how he has assessed the British economy over the period. He appeared to accept that his view of growth was very much influenced by his opinion in 1994 as to how the global economy was going to grow. What he does in effect is to state his view as an

Economist on the future growth prospects of the economy and then claim that his view is confirmed when he examines the figures for the last 19 years. Further he thought that to go back to the late or mid-sixties distorted the picture because of what he considered to be the different economic situation at that time. Indeed he thought that his growth rate of 1.5 % was generous and optimistic. This whole question may be important because the fundamental explanation for the differences between the Economists as to growth factor are the different periods selected as relevant. Of course a jury in 1991 could not have been told about any decline in growth prospects that occurred after that date and this in my view must be a weakness in the period selected by Dr Yeager. Dr Yeager accepted that he had carried out no actual analysis based on how the economic situation must have looked in 1988. I find it difficult to believe that in 1991 a jury would not have found the period selected by Dr Allen reasonable. In addition a Texas jury if faced with competing views may not have found the opinion appealing that in the future their wages were going to grow less than in the past. Over a period of 30 years or so the differences between the factors respectively selected by the two Economists is fairly substantial. It was contended by the defenders that my function was and could not be to decide what a Texas jury would do but rather to consider if in 1991 different opinions would have been expressed to them by the experts. It is certainly true that I cannot decide in any conclusive way how a Texas jury would have responded but nevertheless I must consider what risks the negotiating parties in 1988 were entitled to perceive as realistic. Certainly a jury in 1991 would not have had the benefit of Dr Yeager expressing his views (he personally was not consulting then) so that a question must remain as to whether it could have been anticipated in 1988 that a litigation Economist might express views equivalent to those of Dr Yeager. Dr Allen is of course an experienced litigation Economist and Mr Fisher is an experienced jury practitioner so that it may have been valuable to have had their views on Dr Yeager's approach. With regard to his application of an age profile to loss of earnings Dr Yeager accepted that the applicable discount would vary with the kind of job being considered. Thus work with a high physical content would result in a more pronounced fall in earnings with age. In relation to Mr Robert Carroll the approach of Dr Yeager was to increase his earnings until the age of 45 and thereafter to decrease them annually by 1.6% until the age of 55 and thereafter to decrease them by 5.65% annually. He worked from Tables but set the figures produced by the tables back by five years (fifteen in the case of the Diver, Andrew Carroll) on account of the fact the victims were working offshore. Indeed he said that his own experience with Messrs McDermotts was that offshore workers do not have the same workspan as those who work onshore. Moreover Dr Yeager accepted that his age earnings' profile was not based exclusively on statistics but also had been devised on the basis of his own experience particularly with McDermotts. Counsel for the pursuers was unable to disagree with the possibility that some workers may earn less as they age but he took issue with the Tables used by Dr Yeager. He also quarrelled with the fact that the drop in earnings had been set back five years because of the offshore element. Dr Yeager, at least to a degree, worked from Tables that purport to set out "Money Income of Household, Families and Persons in the United States". These were published by the

United States Department of Commerce. One criticism that the pursuers made of the use of these Tables is that they were designed to include part-time and seasonal workers. These categories may be inclined to work less as they age. Moreover in certain cases the educational categories appropriate to the Tables were not applicable to the cases under consideration. A person doing a hard physical job may well have a different age earnings profile to a person doing a more skilled job. The deceased Mr Pyman, for example was qualified well beyond the standards set in the Table used by Dr Yeager. There was some evidence that over a period of twenty years he would have doubled his earning power. It was equally unrealistic to treat the B. T. telephone engineer Whyte as an offshore worker when his work was normally based onshore. Robert Carroll was a Safety Operator and may well not have done the hard physical work carried out by some who work offshore. The workers killed included skills such as those of a Chef or Electrician that may readily have been transferable onshore. The deceased Cowie was a Caterer who was making his first trip offshore. The deceased O'Shea was an Electrician. Nor can Dr Yeager say if the Tables he used only referred to earned income or if it included income from all sources. In any event he only used the Tables as a starting point and it is not very clear how he derived his profile from that starting point. Dr Yeager may well have a point that certain categories of workers offshore will have reduced earning expectations as they age. However it is difficult to justify the blanket discounts he applied. Whether or not in some cases a jury may have been prepared to make some allowances for this factor is conjectural but the matter is not made any easier by the fact that the questions under consideration was not put to either Dr Allen or Mr Fisher. They may have had important views as to how a Texas jury would be likely to respond to Dr Yeager's approach on the matter. Another matter that gave rise to some debate regarding this area of the case was the personal consumption factor that ought to be deducted from the gross loss of earnings. The consumption factors applied by Dr Yeager were significantly higher than those applied by Dr Yeager. Dr Yeager disagreed with Dr Allen's deductions and preferred himself to have recourse to a document containing what were called Equivalent Scales which were produced by the U. S. Bureau of Labour Statistics. This study was based on 1960 data and only covered a period of one year. Nevertheless Dr Yeager maintained that the study would still have been considered relevant in the late 1980s. It was based on an assumed family of husband, wife, and two children. Other different sized families were related to the benchmark provided by that standard family. Moreover it was a family budget table as opposed to a family income table. Thus instead of taking income and setting out what proportion of that would be consumed by the deceased the Study takes what income would be needed to support a particular standard of living and reduces this correspondingly for a smaller family. However Dr Yeager also used a United Kingdom Study for the period 1988/1989. It has once again to be noted that Dr Allen's deductions for this factor were not challenged at the time. Indeed there was no evidence that in 1988 the budgetary approach favoured by Dr Yeager was ever used in Courts. In the case of Robert Carroll, seeing that the family unit was three persons rather than four persons (or two compared with three taking the position after death), Dr Yeager allowed him 62 units as compared with the standard family 100 units. It

seems to me that a weakness of the budgetary approach is that it does not explain how surplus income would be spent once the family reaches the required standard of living. Nor was I left clear as to what goods and services were included in the Study referred to. Dr Yeager preferred his own approach to that of Dr Allen since he claimed it avoided the need to make conjectural judgments. However a factor that he seemed to take no account of was the fact that with an offshore worker he is getting his food and board provided during the substantial time he spends on the platform. The matter of discount rates raises question of how to treat inflation and also the suitability of the investment policies that the Economists respectively applied. Dr Yeager calculated an inflation rate of 3.75 % per annum for at least the next twenty years. Dr Allen instead worked with real figures and a real rate of growth for wages, and a real after tax interest rate so that he dealt with inflation in this way. Then Dr Yeager takes a real growth rate of wages of 1.5% over and above inflation. This raises the issue of the amount of return one might expect on investment over the relevant period. The method used by Dr Yeager to forecast inflation is once again dependent on his experience and judgment which of course may well be as good a way as any in this field but makes his views difficult to assess. Dr Yeager claimed to have an extensive experience of the United Kingdom economy as the foundation of his forecast. Dr Allen's method for calculating the return on the capital received was to look from a historical perspective at the rate of return on Treasury Securities for a twenty five year period. He assumed that the real rate of return over that period would be approximate to what would happen over the next twenty year. Moreover he did not calculate on an after tax basis because he assumed that tax on the return would largely be cancelled out by tax payable on the interest. Dr Yeager attempts to justify his figures by reference to what he calls a Consensus Forecast for the United Kingdom economy arrived at by thirty leading British Economists. The difficulty is we were not told much about this study so that Dr Yeager was unable to say if the so called consensus was an averaging of differing views or truly a consensus. Moreover the Consensus Forecast was not one which remained static for an extended period but changed regularly as time progressed. In any event he later claimed not to have relied on this Consensus Forecast but simply regarded it as a reference point. His own forecast was fractionally higher than that of the thirty Economists. We were not told what the Consensus figure would have been in 1988. Dr Yeager declared that he would regard five-Year Treasury Securities as an appropriate investment in July 1991. The average monthly return for the month was 10.35%. After the security matured he would have expected an interest rate of 6.86% giving a return of 3% in real terms. The return on Dr Allen's 90 day bonds was under 1%. The shorter term investments although they give a lesser yield are of course a safer investment. Dr Yeager gave as an alternative investment Index-linked Treasury Securities. He thought that such an investment would have yielded over an extended period 4.35% (allowing for the purchasing premium) or in any event 2.5% per annum. Of course Dr Yeager's estimate is based on the assumption that in 1991 the securities could have been bought at a discount and he apparently makes no allowance for the fact that after twenty years had passed they might have to be sold at a discount. If the Bonds he suggested had been used Dr Yeager

estimates that the pecuniary loss would have been about £10 ,000 less. Dr Yeager also thought that had the capital been invested in common stock an annual return of about 6% might have been expected. This opinion however is based on the investor having a diversified portfolio of stocks and being prepared to hold them for 15 years. Moreover Mr Fisher and Dr Allen's position is that it should be presumed that a widow intent above all on preserving her capital would elect for the safest investment that could be found. Only experience could tell if such an approach would be likely to appeal to a Texas jury seeking to compensate a widow and children for the financial loss resulting from the loss of a father or husband. Although Dr Yeager did not know the precise figures, he was unable to refute a suggestion put to him that taking the period 1968 to 1988 the actual return on five year Treasury Bonds had averaged 1.7% and that if the period had been extended until 1991 the return would have averaged 1.22%. It may well be that many claimants would be dissatisfied with short-term bonds and would want to put their money or at least part of it into something with a better yield. However Dr Allen's proposition that a widow should not be expected to put her only income producing asset into any investment with an element of risk may have struck a chord with a sympathetic Texas jury. Dr Allen's considerable experience in the courts seems to have indicated to him that it would. Dr Yeager on the other hand could not claim that his methods had been tested before a jury. Indeed there was evidence that in 1988 defendants in Texas rarely called Economists as witnesses. The common tactic was to rely rather on submissions to the jury and it can be supposed that in the absence of expert back-up these would be pretty fundamental. The assessments of loss by Dr Allen and Dr Yeager both contained a factor for household services (although Mr Fisher's calculation did not). Dr Allen uses the "bench mark value" approach. He does this by inviting the jury to apply a multiplier to the estimate of the value of services lost annually. In the case of Robert Carroll he took as his benchmark £1000 per annum and multiplied this in the case of pre-trial loss by three and in the case of post-trial loss by thirty-nine this figure being the balance of his life expectancy. Dr Allen adjusts for taxes in the case of loss of household services because one always gets a higher value if taxes are taken into account because of the question of requiring to provided enough both to replace the earnings and to pay taxes. Thus for the item under consideration Dr Allen calculates a total loss of £65,000 as his benchmark figure. He then goes to a Study known as the Cornell University Study to get a true adjusted loss. This Study was completed in the late 1970s and is designed to show how much time people in different family situations spend in performance of useful services. He found by reference to this Study that in a family similar to the Carroll family the husband spent about 600 hours per year performing household services. Applying average wages for manual workers, Mr Carroll's services could be said to be worth about £2,500 and to adjust this to the benchmark of £1,000 requires multiplying the benchmark loss by a factor of 2.5. This gives a supposed actual total loss of £163,000. Dr Allen's calculation was not tendered to the court as an actual estimate but rather as an illustration as to how the calculation may have worked out in the Carroll case. Dr Yeager did not accept the Cornell Study as applicable and of course use of this Study is vulnerable to the comment that one is supposing that the habits of

Americans relating to household services coincide with those of Britons. The Study is also rather out of date. On the other hand Dr Allen claimed that his approach is one that is regularly used before Texas juries. Dr Yeager thought that it was reasonable to assume that Mr Carroll provided total services of seven hours in a week. He then worked out total loss allowing for tax and inflation by using his method of calculating such future loss. He only allowed multiplication up to the end of working life rather than work expectancy. I am not sure how that particular approach would have appealed to a jury since it seems to me to be common experience that a retired person may have more time and even inclination to contribute to household duties than a younger person with more calls on his time. Dr Yeager indicated that there had been a new Cornell Study but it was doubtful that this would have been available in 1991 and in any event he was unable to explain how it differed from the earlier Study. Dr Yeager made a point that may just have appealed to certain juries that whereas a wife will lose her husband's services she may have a net time gain by not having to look after him. The pursuers argued that Dr Yeager's estimate of one hour a day spent on household services had no statistical basis whatsoever and would be particularly inappropriate for a man like the deceased Caroll who because he worked offshore in fact spent half his time at home. It was also said that there was no basis in the evidence to conclude that a Texas jury would be prepared to offset the wife's saving in time against loss of her husband's services which may well comprise matters that she would not be able to deal with herself. In respect of the survivor case concerning Andrew Carroll, he was a Diver. At the time of the settlement negotiations he was suffering from PSTD and it appeared that he would never work again. Both Dr Allen and Dr Yeager assumed that he would stop working as a Diver in his forties and thereafter would find alternative employment. Dr Allen worked on the basis that Mr Carroll would have earned about 25% less after ceasing to work as a Diver at the age of 45. Dr Yeager on the other hand took Mr Carroll's period as a Diver to the age of 42 and then reduced his earnings by applying an age earnings factor setting back his age by 15 years (rather than 5 years as in non-Diver cases). Certainly the proposition that a Diver's earnings will decrease with age while he is still able to work as a Diver is not supported by any statistics. Presumably one is either working as a Diver or is not and that while thus working earnings will not decrease. He then applied a further age earnings factor for the period beyond 42 years and the net result was that would have sustained no loss at all after he had retired from diving. Dr Allen's calculations bring out a total loss for Mr Carroll of £218,000. On the other hand the total loss measured by Dr Yeager is £118,789. The Arbiter, Mr Coutts QC, assesses Mr Andrew Carroll's future wage loss at £115,000 that is based on a five year multiplier which sits awkwardly with the results obtained under Dr Yeager's methods. Dr Yeager's figures are further distorted by the fact that in relation to pre-trial earnings he has ascribed to Mr Carroll calculated notional earnings of £11,616 per annum whereas his actual earnings capacity was at the rate of over £13,000. On the other hand between the accident and the notional trial date Mr Carroll was in light work only and was not earning the figures which Dr Yeager ascribed to him. Dr Yeager also took into account assumed work expenses for Mr Carroll which he increased annually to account for inflation (although making an

allowance for tax). On the other hand he made no allowance for perquisites and benefits of which pension contributions were one. There was no evidence about work expenses falling on the injured man. It must also be noted that although there were a number of Divers who gave evidence about various aspects of the accident they were not queried by the defenders about their earnings prospect as they aged. The defenders objected to Dr Allen's evidence on the ground that they had not had notice of the detail and also on the ground that he had not produced some of the documents on which he purported to base his opinions. However the defenders had a considerable time to prepare their own expert for their reply and I allowed them to lead on many points which had never been put to the pursuers' witnesses. In a case as long and complicated as this if an artificial result was to be avoided some flexibility in the presentation of evidence had to be tolerated all of course subject to the avoidance of prejudice or unfairness to any party. At the end of the day both parties had the opportunity to lead comprehensive evidence from the experts of their choice. For example Dr Yeager's evidence took almost four days. Although much of the defenders' evidence had never been put to the pursuers' witnesses I did not feel that this seriously handicapped me in what I had to decide. It will have been noticed that there were six main areas where the parties differed in the economic evidence. These were worklife expectancy, personal consumption factors, household services, increase of earnings, discounting to present values and the implication of tax on wages. The defenders contended that it was not clear whether a Texas jury would in fact follow the Scottish rule of regarding the net rather than gross wage but this may not matter in the present context because paradoxically the net wage often produces a higher end result than the gross. This is because of the countervailing factor of the effect of tax on interest. It was submitted by the defenders that it was not possible that I should choose between the two experts on the matter of worklife expectancy because the material upon which Dr Allen relied was not produced so that the defenders could not scrutinise the figures. It can be said that there are areas where Dr Yeager's figures may be suspect. For example his reliance on figures that include black and part-time workers in relation to a situation in the North Sea. Even if this factor were significant to the total calculations which I doubt I would accept that it would be difficult for me to decide just what work expectancy figures would command the most support among economists. Mr Fisher's figures were arrived at in a more pragmatic fashion and it is interesting to note that pursuers' attorneys do not always use economists before juries and seem to succeed in persuading juries without them. This may illustrate the limited value of a complex economic analysis in a question of the kind we are considering. With regard to personal consumption factors again it might be difficult to make an exact comparative analysis between the figures of Dr Allen and Dr Yeager but the matter is one about which the jurors may feel qualified to form their own view and Dr Allen is well placed to have some experience of the range of figures which a jury may be inclined to accept. In relation to the matter of household services Dr Yeager argued that the Cornell study used by Dr Allen was outdated, no longer relevant and not completed by professional economists. It may well be the position that no available statistics would accurately show what input to domestic services is to be expected from an offshore worker

and the matter is not so esoteric that a jury may feel it necessary to evaluate complicated economic evidence. The question of increases in future earnings has a considerable influence in the experts' final figures. In respect of the inflation factor Dr Allen used an average historical figure. Dr Yeager attempted to project future inflation on the basis of the circumstances which he judged were likely to apply to the British economy in the future. Dr Yeager's approach struck me as much more speculative and one which would tend to involve a jury in unwelcome and complicated economical forecasting. Dr Yeager also introduced what he claimed to be a more sophisticated approach of taking account of a wage earnings profile. He claimed that it would be simplistic to regard the future as offering a mirror image of the past. In theory he may be quite right but once again he is proposing to involve the jury in controversial economic forecasting whereas the simpler approach of Mr Fisher and Dr Allen has the clear merit that it has worked well in the past. The problem of accepting Dr Yeager's methodology as a jury point is illustrated by the fact that on this one point he occupied about 50 pages of the transcript in technical cross-examination. Mr Fisher may or may not be much of an economist but I have no doubt that he is proficient in presenting the kind of arguments that would be acceptable to a Texas jury. However the defenders asked me to conclude that, at the very least, the technical matters spoken to by Dr Yeager represented tenable arguments that might well have impressed some juries. On the question of the discount rate, I have already commented on the fact that Dr Yeager's method involves seeking to apply a higher investment yield than Mr Fisher and Dr Allen have used in the past. Mr Greene suggested that in Texas the process of taking evidence involves much more use of documents and depositions than would be the case in the United Kingdom. He pointed out that as all matters go to jury trial in the Texas state system jurors have often shown themselves able to cope with difficult technical questions. 11.6.5. Quantification of Payments to Claimants If claims under the indemnities were to succeed they would require to take account of the amounts that were actually paid out to the claimants following upon the settlements. In the Robert Carroll case the sum concluded for in respect of payments covering the loss (conclusion 1) is £683,853.72 while conclusion 2 deals with the expenses paid to the claimants' solicitors and is for the sum of £20,465.79 inclusive of VAT. The claims relate to the widow, Mrs Carroll, and her daughter who was aged two at the date of death. The pleadings narrate that Decree was granted against the pursuers and the participants in the Court of Session the individual amounts being £537,853.72 to the widow and £166,000 to Mrs Carroll as tutrix to her daughter. These two sums added represent the first conclusion and they also represent the principal sums at which the Robert Carroll action was settled. The second conclusion is said by the pursuers to be based on Chapter 10 of the Table of Fees of the Law Society of Scotland. The Pursuers' witness Mrs Lesley Gray, a partner in Paull & Williamsons, gave evidence that the sums sued for had been paid to the claimants. This evidence covered the sums sued for in all the test cases and I did not understand it to be challenged that these amounts had been paid over although there was of course a challenge as to the appropriateness of the sums paid. The fact that payment had been received by the claimants was also spoken to by the solicitors respectively representing

them. Although, as I have indicated, outline terms of settlement had already been agreed between the Pursuers and participants on the one hand and the Piper Alpha Disaster Group and the Cleveland Group on the other, the individual claimants had not received formal offers from the Participants to settle for specific amounts and this was rectified by letters to each of the claimants dated 2 May 1989. The sums being offered to each claimant (and the relative Scottish values) were specified in a Schedule attached to the letter and upon receipt of the formal offer letter all the claimants accepted it. The Scottish values were of course important since the enhanced sums offered were derived from them. After acceptance of a particular claim the claimants were required to vouch the factual background to their claim before payment was authorised and the inquiries in this regard were fairly extensive. The sums attributed to Mrs Carroll for Loss of Society on a Scottish basis was £9,000 and the sum allotted to the two year old child Ashleigh for the same element of loss was £8,000. The Carrolls had been married for eight years at the date of the accident and the deceased had been 34 years old. The Scottish values used in the settlement process were arrived at by Mrs Gray, Mr Tierney and Mr Park (all partners in Paull & Williamsons and very experienced reparation lawyers). They also had recourse to recent awards in the authorities when they calculated their figures. Mrs Gray accepted that whereas the aim had been to achieve a fair assessment for the Scottish values £9,000 was at the upper end of the scale for Loss of Society. I was referred to Wilson v Chief Constable of Lothian and Borders 1989 SLT 97. In that case the deceased and his wife were both 26 years old and they had three young children. The marriage was clearly not a model one for the deceased had threatened his wife with a knife on the day of his death and from time to time he drank excessively. Comparing that with the present case it is difficult to envisage that the widow would not have achieved at least a slight increase over the Wilson award. The Lord Ordinary awarded the widow £8000 for Loss of Society. In Worf v Western SMT Company Ltd. 1987 SLT 317 the deceased was 32 at the time of his death and the widow was awarded £9,000 for Loss of Society. Counsel in the case had suggested that the then current rate for such awards was between £8,500 and £10,000. Dingwall v Walter Alexander & Sons (Midland) Ltd. 1980 SC 64 was regarded for some years as influential in relation to this question of Loss of Society. On appeal in that case the view was expressed that a proper award for Loss of Society would have been £ 6,000 which is not out of line with £9,000 in 1991. In Prentice v Chalmers 1984 SLT 63 the deceased was aged 43 and the widow was awarded £7,250 for Loss of Society. In Davidson v Upper Clyde Shipbuilders 1990 SLT 329 the Lord Ordinary awarded a widow of 58 (the deceased being the same age) the sum of £9,500 for Loss of Society. The cases which followed Davidson showed a steady trend to increase awards to widows for Loss of Society so that by 1992 Lord Abernethy in Wotherspoon v Strathclyde Regional Council 1992 SLT 1090 felt entitled to award a widow aged 40 the sum of £12,000. In the cases I have mentioned some of the spouses seem to be older than Mrs Carroll but the age of the spouse appears to have no predictable influence on the size of awards. In my view in the light of the foregoing cases it would be difficult to say that in 1988, £8,000 was other than a reasonable estimate of the generality of Loss of Society awards in Scotland. The pursuers also reviewed the authorities on appropriate

awards to children for Loss of Society. In Rafferty v J & CM Smith 1987 SLT 538 the Lord Ordinary awarded £7,800 for a child aged 2 and £6,500 for a child aged 6. In Dingwall the Inner House also considered the position of the children in the case and it can be inferred that they would have considered an award in excess of £3000 which, allowing for the passage of time, would now be worth about £9,000 but the child in the case was aged 5. In Worf in 1987 a child of 2 was awarded £6,500 and in Wilson £6,000 was awarded for a child under one year old but there of course the state of the marriage was such that separation of the parents may have ensued. In respect of the child Ashleigh, the Scottish value of the claim for Loss of Society was agreed for the purposes of settlement enhancement at the sum of £8 ,000. In the light of the cases I have just referred to this sum is just about consistent with Rafferty though maybe rather on the high side in relation to some of the other cases. On the other hand the sum cannot be said to be beyond attainment. It has to be borne in mind that the negotiation of Scottish values was conducted by a large number of lawyers with wide experience of current reparation awards (including Counsel) and there seems to have been a fair consensus that £8,000 was a reasonable value for the child's Loss of Society. My own view is that, given the state of awards and professional opinion at the time, £8,000 was a reasonable figure to take into account as a fair Scottish value for such a claim. In relation to the loss of support claim, £13,500 was taken as Mr Carroll's basic annual income to be used as a multiplicand for computation of Scottish values and from this 25% was deducted for personal consumption. The earnings figures were taken on a net basis (with a requirement for vouchers to be produced) and the multiplicand in the Carroll case was multiplied by 15. Claimants were asked to produce a work history for the previous three years with details of the income over the 52 weeks preceding the accident. Guidelines were negotiated for calculating the multiplier for variously aged deceased. These were available both in death cases and appropriate injury cases. They were made available to the Arbiter for his guidance. It was argued by the defenders that the multiplier of 15 was too high if account is taken of the fact that the Scottish value is to be enhanced by multiplying by a further 2.5. Thus in the case of a man aged 55 at the time of death if the guideline multiplier of 8 years was applied to his net income and the resultant figure is then multiplied by 2.5 his family will in fact receive twenty years purchase which would have required him to work to the age of 75. Mrs Gray accepted that, to take a person to whom the highest age in the bracket to which the 8 year multiplier applied could result in a figure, appeared rather high in logical terms but the settlement terms had to be sufficiently practicable to apply globally and she considered that one must not lose sight of the fact that at the end of the day the settlement figures had to be related to what was attainable in Texas. I consider that the defenders' attack in respect of the multiplier was not to the calculation of the Scottish value but to the effect of applying a particular enhancement factor to the Scottish value. Thus it is an attack on the enhancement multiplier of 2.5 but of course that was calculated so as to be operable over the whole spectrum of the claims and with a view to arriving at global results that would be acceptable to claimants and advantageous to the Participants. Moreover it has to be remembered that, in comparing Texas total multipliers with the effect of enhancing

Scottish values, the Scottish multipliers would be applied to net earnings whereas Texas multipliers were being applied to gross earnings. The settlement machinery would only have been relevant to the extent that it was a fair way of producing overall results that were favourable relative to what might have been recovered in Texas. The pursuers again founded on the case of Worf where a multiplier of 15 times was applied to the case of a man aged 32. In Riddell & Others v James Longmuir & Sons Limited & Another 1971 SLT (Notes) 33 the Lord Ordinary decided that in the case of a man aged 41 a multiplier of 14 or 15 would have been appropriate. In the case of Prentice which I have already referred to a multiplier of 12 was allowed in respect of a man aged 42 and in Rafferty the multiplier for a man of the same age was 13. I have little doubt that in computing Scottish values the multiplier applied to the case of Robert Carroll was not out of the way. Nor can I find any objection to the application of a personal consumption factor of 25% in a case such as that of Mr Carroll. With regard to Loss of Personal Services this was computed for Scottish values by allowing a multiplicand of £3,000 per annum with a multiplier of 15 years. In Worf the deceased who was an American attracted a multiplicand of $8,000 per annum (equivalent to about £4,700 per annum). It seems that he was a person very active in the home but it has to be noted that the judge only allowed him a multiplier of 10 years. It was conceded by the pursuers that Loss of Services claims in the case of offshore workers are somewhat special because it is not easy to know if the two weeks alternating periods at home produce the same or even a greater contribution to domestic matters. To achieve an overall and reasonably expeditious settlement the matter had to be averaged over the range of cases. The Scottish values for Loss of Services claims were of course subject to the uplift of times 2.5. In Farrelly v Yarrow Shipbuilders Ltd. 1984 SLT 1349 a man aged 62 had the annual value of his services to the home valued at £2,000. The Lord Ordinary in the case was able to calculate this figure on a fairly precise basis. A multiplier of times seven was allowed but this figure was related to the age of the deceased. The total award for Loss of Services in Worf was £47,000 which has to be compared with £45 ,000 being the estimated Scottish value in the Carroll case. Worf was a case founded on by those negotiating the settlement (on both sides) and the scarcity of authority on the relevant matter did not assist the negotiations. The question of consequential outlays was dealt with by attributing a figure of £1,000 to such loss and the defenders did not challenge this relatively minor item. The pursuers in respect of the claim by the family of the late William Cowie seek to recover the amounts claimed in the first two conclusions of £820,468.43 and £24,393.47 respectively. These sums were paid under the settlement by OPCAL and the Participants in respect of the Cowie family claim and expenses. Mr Cowie was 32 at the time of his death and was survived by a widow and three children who were respectively aged 6, 5, and three months. At the time of the accident he had been a caterer with Kelvin International. Mrs Cowie had been married to the deceased for about nine years. The Cowies seem to have been a very happy family. For Loss of Society, in respect of Scottish values, the six year old child was allowed £6,500, the five year old child £8,000 and the infant child also was allowed £8,000. It was argued by the pursuers that the sum of £2,500 would represent a reasonable Scottish value for each parent based on the

consequences of the case Heap v West Highland Crofters and Farmers Ltd. 1985 SLT 191. The figure awarded in that case was in fact disapproved of in Donald v Strathclyde Passengers Traffic Executive 1986 SLT 625 where the Inner House suggested that £2,000 would have been reasonable for a parent's Loss of Society. Thus by late 1988 £2,500 does not seem an unreasonable figure to regard as a Scottish value. Moreover in the settlement each parent was allowed the Scottish value enhanced to £50,000 which was agreed to be a suitable value for this element of loss in a Texas context. Parents recover large sums for Loss of a Child's Society in Texas . To calculate Loss of Support, Mr Cowie's annual earnings were £8,141 and these were treated in the same way as the equivalent calculation in the Robert Carroll case. For Loss of Services the multiplicand was taken at £3,000 with a 15 years multiplier. As in the Robert Carroll case, Mr Cowie appears to have contributed much to the home. The claimants were allowed £1,000 for the expenses following upon the death as in the other cases. In the case of the deceased John Duncan the first Conclusion is for the sum of £865,565.12 and Conclusion 2 (the solicitor's expenses) is for £25,805. These were the sums paid out by OPCAL and the Participants in respect of the claim. Mr Duncan was aged 33 at death and was survived by a wife, three children and two parents. In respect of Scottish values the figure allowed to the wife for loss of Society was £ 9,000 and the sum allowed for the children aged 9 and 7 respectively was £6,500, while the figure for the youngest child aged 1 was £8,000. The marriage was said to have been reasonably happy and was of about eleven years duration. For loss of support in respect of Scottish value, a multiplier of 15 was allowed and 25% taken as the deduction for the personal consumption of the deceased. The annual earnings were valued at £10,500. Loss of services was calculated as in the other cases and the deceased in fact was in the habit of contributing valuable personal services to his family. The parents each were allowed £2,500. I think that if anything the values used in the Duncan case were conservative because there was an argument that his wage should be taken at a higher figure and also in this case the deduction for personal consumption may be rather high relative to the reality. Expenses of death were again taken at £1,000. The claim of the family of the deceased Graham Gill Whyte was somewhat lower than some others and the first Conclusion in that case is for £435,123 .06. The second Conclusion for solicitor's expenses is for £13,314 .78. These Conclusions again represent the sums that were paid over. In this case Mr Whyte had been divorced and the claim was advanced on behalf of an established co-habitee. As a Scottish value she was allowed £9,000 for Loss of Society and the children aged 20 and 18 respectively were each awarded £2,500. It was shown that they had extensive continuing contact with their father. Mr Whyte and his co-habitee had lived together for six years. The relationship was happy and established and they had entered into missives to buy a house in joint names. Mr Whyte was aged 42 at death. The multiplier for Loss of Support was taken at 10. The claim was allowed an element for Loss of Services as in the other case although in this case there was no definite information as to the services generally performed by the deceased. On the other hand it can be assumed that he performed some such services and I think it is fair to acknowledge that individual settlements had to be negotiated on a general basis which would fit into the overall settlement terms. These

terms had to be settled in a manner that would render the settlement of individual claims reasonably expeditious and practicable. In the case of the deceased, Michael O'Shea, the first Conclusion was for the sum of £600,000 and the second for £18,055. These again represent the sums paid out in settling the claim. He was aged 30 at death and had a wife but no children. He also had two surviving parents. The Loss of Society award for the wife was once again fixed at £9,000 and it is clear that they were a happy couple. The deceased was aged 30 at the time of his death and for Loss of Support a multiplier of 15 was taken with a deduction of 25% for personal consumption. Loss of Services was dealt with as in the other cases and the usual allowance for expenses of £ 1,000 was taken into account. The last of the death cases relates to the deceased Neil Pyman. In that case the first Conclusion is for £1,100,000 and the second for £32, 000 these being the sums paid out to settle the claim and consequential expenses. Mr Pyman was aged 32 at death and was survived by a wife, a daughter aged 2, and two parents. For the purpose of Scottish values the Loss of Society for the wife was taken at £9,000 and that for the child at £8,000. The multiplier for Loss of Support was taken at 15 with a deduction for personal consumption of 25%. Earnings were taken at £18,889 but it was recognised that this multiplicand was inadequate because it became clear that the deceased had definite promotion prospects. The anticipated promotion would just about have doubled his salary. Indeed the sum of £150,000 was added to the final American figure because these prospects were clearly established. Loss of Services was recognised as in the other cases and indeed it was shown that the deceased made a substantial contribution of services to his family. The final case to be considered is that of Andrew Carroll, who was a survivor. In that case the first Conclusion is for £384,700 and the second for £11,865.12. As with survivor cases it went to arbitration to establish the Scottish value of the claim and the Arbiter awarded £157,350. The Arbiter then applied a multiplier to get a total Texas value for the claim of £384,700 that was the sum paid to the claimant plus the expenses as indicated. With regard to the calculation of the fees paid to the solicitors of the claimants and reflected in the second Conclusion in each case these were arrived at on the basis of an extra-judicial settlement and computed in terms of Chapter 10 of the Scottish Law Society Scale. The defenders specifically challenged this matter and claim that since the damages payable to Claimants were ultimately paid-out on the basis of a Court Decree the settlements should not be treated as an Extra-judicial settlement. It has to be noted of course that although settlement payments required as part of the settlement process to be preceded by a Decree this was by arrangement designed to protect the paying parties against subsequent further claims and in terms of the negotiated settlement the actions were settled by Joint Minute. The Memorandum of Terms and Conditions of Settlement which is 12/295 of process makes provision that expenses and interest should be paid notwithstanding that the decrees in the "confirming actions" shall make no provision for such expenses and interest. The right is preserved as a distinct and contractually enforceable contractual right. The Joint Minute (12/293 of process) is not entirely consistent with the said Memorandum. The defenders argue that not only did the Joint Minute supersede the earlier Memorandum but that the provisions of the latter declared to be a separate and

independent right were departed from. In relation to the second conclusions the question of expenses is the only one which arises because the earning of interest was dealt with by consigning the sums due to a particular claimant as soon as the amounts were ratified. In contrast the Andrew Carroll case has a Joint Minute which provides that the defenders in the case shall be jointly and severally liable to the claimant in expenses as same may be agreed. Failing agreement the account was to be remitted to the Auditor of Court. However, whatever arrangements were arrived at in relation to the expenses of the "confirming actions" and modifications to these which may have been agreed, obviously these expenses were the judicial expenses relating to these actions and these are relatively insignificant. The arrangements for payment of the claimants extra-judicial expenses are quite a separate matter and would, if due at all, have to be regulated by the settlement terms. It is certainly true that in the absence of agreement the claimants would have had no entitlement to extra-judicial expenses. However the pursuers in these cases claim that it was necessary to offer to pay such expenses in order to preclude Texas litigation. This of course is a question of fact and I think the Company were right in thinking that a failure to offer such expenses could block the settlement. It has to be acknowledged that if at any stage the Company and Participants had departed from the agreed settlement terms the claimants could have argued that the settlement had not been honoured and sought to renew their claims in America. The scale fees for an extra-judicial settlement are more favourable to solicitors than judicial expenses. The defenders argue that these expenses are not truly expenses at all but rather fees paid to solicitors. During the negotiations of the settlement these fees gave rise to a division of opinion between the negotiators. Those representing OPCAL and the Participants thought that fees should be calculated on the Scottish levels of damages rather than on the enhanced levels whereas the representatives of the claimants considered that since solicitors were achieving settlements for their clients at the higher figures they should be allowed a fee commensurate with the responsibility of having negotiated the enhanced sums which were what was actually received. This matter was so seriously regarded that for a short time it delayed settlement. However eventually OPCAL and the other Participants agreed to pay fees calculated on the enhanced values. I consider this approach to be reasonable and logical. The actual benefits which the claimants' solicitors had negotiated for their clients were the enhanced values. An ad valorem fee if it is to make sense must take into account responsibility for the settlement sum negotiated and on that basis the solicitors were assuming responsibility for the higher figures. In any event looking to the precise terms of the Table of Fees, the Scale provided by Chapter 10 is for the "Negotiating and completing settlement of claims for damages or reparation". There is no doubt that the completed settlement terms provided for the payment of Texas values. With regard to the extra-judicial quality of the settlements the pursuers argued that the Court proceedings were merely part of the agreed machinery for the implementation of the extra-judicial settlements and as I have said I think there is merit in that view. Table 10 is of course only an option but I consider that its adoption was reasonable and convenient in a situation such as this where there are multiple claimants and it is vital to have early settlement of claims. Of course I

acknowledge that if the defenders are right in their contention that any loss recovered under the indemnities must be calculated on the basis of Scottish levels of damages (and I have held this to be the position in relation to all the death claims) then fees calculated ad valorem would have to be proportionately reduced. It has to be noted that the Indemnities in these cases cover expenses which specifically are not limited to the cost of a litigation. With regard to the totals of Scottish fee levels in the test cases these in the Robert Carroll case totalled £7,767, in the Cowie case they totalled £5,809, in the Duncan case £6,538, in the Whyte case £4,296, in the O'Shea case £5,732, in the Pyman case £8,869 and in the Andrew Carroll case £5,328. It should be noted that these amounts include VAT. In fact the amounts that appear in the second Conclusions include VAT which would have been chargeable by the various solicitors due these fees. The pursuers' argument was that, if I was against them on the level of losses that were properly covered by the indemnities, then the pursuers should be covered in respect of the fees as if charged on Scottish values. It has to be noted that the sums set out in the fourth conclusions represent the proportion attributable to each claim of the solicitors' fees incurred by the members of the Consortium in negotiating settlement with PADG and claimants' solicitors. I did not understand the calculation of these items to be the subject of specific challenge. The fees' charges were also based on Chapter 10. In fact the actual fees incurred were in excess of the amounts claimed. 11.6.6. Expenses of the Cullen Inquiry It was part of the settlement terms that the Participants should pay the legal expenses incurred by the PADG in respect of representation at the Cullen Inquiry. The total expenses which was paid in this regard is divided among the claimants represented by PADG and the proportion due by each claimant and paid by the Participants is the subject of the third Conclusion in each of the test cases. Such Conclusions also contain an element for the proportion due by each claimant of the expenses specifically incurred by the members of the PADG on PADG business. The two elements in these expenses when added together total about £3 million so the item is by no means negligible. The pursuers contended that such expenses were expenses reasonably incurred as a result of the accident and that therefore they should be recovered under the indemnities as a recoverable loss. It seems that either the Department of Energy or the Department of Trade and Industry were anxious that the claimants should be represented at the Inquiry and encouraged them to seek to have their expenses covered by the platform operators. Moreover the claimants' representatives had asked OPCAL and the Participants for these expenses at a meeting in August 1988. It appears from the evidence of Mrs Gray (who alone gave evidence on the matter) that the Participants agreed to meet the Inquiry expenses partly so as to avoid discouraging settlement if the claimants had to meet them and also to avoid possible public relations problems if the operators failed to cover these costs. It has to be noted that there was no direct evidence that the settlement would have failed if the Cullen Inquiry expenses had not been paid. With regard to the division of the Conclusion 3 expenses between Inquiry costs and PADG expenses the former came to £921,139 and the latter came to £1,742, 000. I am satisfied that failure to pay the PADG negotiators' expenses may have been a necessary arrangement to tempt the claimants to accept the final settlement terms. However I am

not satisfied that the payment of the Cullen Inquiry expenses was central to the settlement of claims. It may have been prudent for public relations that the Operators should promote the presence of the claimants at the Inquiry. They may also have felt that they had a certain overall responsibility. It is indeed admitted by Mrs Gray that the payment of the relevant expenses were not free from a public relations motive. The fact is that this part of the pursuers' cases was not explored in any depth and accordingly I cannot be satisfied that a failure to offer the Cullen Inquiry expenses, being unrelated as it is to the direct negotiation of the settlement, would have affected the prospect of settlement. The matter may indeed have had some impact on the settlement but as the evidence stands this remains speculative. Accordingly were I making awards to the pursuers in respect of Conclusion 3 then I would not incorporate the proportion of expenses claimed that relates to the Cullen Inquiry. I consider that a fair and practical way to apportion the 3rd conclusion expenses would be to allocate one-third of them to the Cullen Inquiry and the remaining two-thirds to PADG expenses. 11.6.7. The Injury Claims The defenders contended that the pursuers had not proved the reasonableness of the sums paid to the survivors of the accident. Under the settlement terms, failing agreement, the Scottish levels of damages in the survivor cases had to be determined by arbitration before Mr T. G. Coutts QC. Certain agreed guidelines were given to him. The idea was that these Scottish levels would then be multiplied in accordance with the formula intended to make allowance for the prospect of Texas enhancement. The defenders here made a technical argument in that they argued that they were not bound by the results of the arbitration proceedings since they had not been a party to them. The pursuers therefore had to prove the validity of the damages assessed in Mr Andrew Carroll's case (his being the one survivor case featuring in the test cases). It is certainly true that the pursuers did not produce evidence of the extent of Mr Carroll's loss but rather relied on the arbiter's determination. The defenders' point is that they had no opportunity to test or cross-examine on the question of level of damages. I think their submissions are wrong because they ignore the significance of the arbiter's determination of loss. Under the settlement terms the pursuers did not agree to pay specific sums to the survivors. What they did was to agree a formula for the derivation of the loss suffered by each survivor. Thus the Company could not have challenged the arbiter's award any more than the defenders. The question to be answered was is it reasonable that a party settling the claims should have accepted the procedure used to arrive at operative figures for survivors' losses. In many cases a party having to settle a claim has time to ask for all the information and vouchers that could possibly be required before an offer to compromise at a specific figure is agreed. In such a case it might not be reasonable to settle on the basis of a decision by a third party. However in the present cases because of the time pressures the Company had no opportunity to be fully informed on the condition of surviving claimants and to form its own view as to the value of the claims. Moreover any method of determining claims that was proposed had to be reasonably acceptable to the claimants concerned if risky litigation was to be avoided. Thus the pursuers are not asking the Court to decide the proper value of Mr Carroll's claim. That could not be ascertained at the time of settlement.

They are asking the Court to hold that the method of resolving these survivor claims was reasonable and if the method is accepted as reasonable then they must prove the sum the application of that method arrived at. I have no doubt that the method of deciding these claims in relation to Scottish levels of damages was perfectly reasonable. The pursuers could not in practical terms have the survivor claims assessed within the time span that the settlement negotiations allowed. The arbiter they proposed was a highly experienced Senior Counsel with, in particular, extensive experience of Reparation work. It was perfectly reasonable for the pursuers to assume that the arbiter would arrive at fair and reasonably accurate figures for the Scottish values of the claims. If they wanted a settlement they had little alternative but to settle on such a basis. The defenders relied on the case of Biggins supra as authority for the submission that direct evidence of the reasonableness of the settlement must be led but, for the reasons I have given, I do not think that primary evidence of the actual loss could be expected in the circumstances of this case. Of course even if the method for arriving at a figure of loss is reasonable it may be possible for a defender to establish that in a particular case the method failed to work properly. I think it was proved that Mr Coutts did not resolve his arbitrations without being supplied with evidence. In the Carroll case he appears to have been provided with evidence from witnesses, Reports, and documents. If my views above are wrong then in any event the contractors had the onus of pleading and proving that the arrangements for using arbitration to determine the value of personal injuries claims were not reasonable. This is because they did not take advantage of the opportunity they had to comment at the time on the settlement arrangements. I have already dealt with this in Chapter 9. It might be worth noting that the award in the Andrew Carroll arbitration was not pronounced until January 1991. It might also be noted that in their pleadings the defenders admit that Andrew Carroll was injured in the accident although they do not admit the extent of his injuries. 11.6.8. Level of Awards In my view the defendants in claims raised in Texas by the claimants in Texas would have been very vulnerable to awards against them in the range somewhere between the figures of Dr Allen and those of Mr Fisher. In Texas, because of the importance of jury trials, it is clearly not possible to predict awards with any degree of certainty and this is shown by the difficulty those concerned in the negotiations had in estimating Texas awards. However I think that some point between Mr Fisher's estimates and those of Dr Allen represent the most probable result of a jury trial. Of course I am proceeding on the assumption that the claimants would have established full liability but I think it was accepted that this was almost inevitable. The basis for my view emerges from the opinion that both Mr Fisher and Dr Allen were highly experienced and impressive witnesses. The ranges of figures they spoke to were not the result of theoretical exercise but rather what they had observed to be a likely outcome of the litigations we have been considering. Dr Yeager was certainly able to produce some interesting ideas but they had been largely untested in court. His approach was certainly far more complicated than the approach of the pursuers' witness and presumably the latter use their methods because experience has shown that they are the most likely to work. Moreover there was no evidence that the kind of analysis formulated by Dr Yeager was ever used by defendants or

even that there were economist experts available who would have employed his approach. Mr Greene as I have observed had far less recent and relevant experience than Mr Fisher and to some extent he hung onto Dr Yeager's coat-tails. However in assessing the likely awards of damages I am also aware that it is quite possible that the jury would have chosen to make what was described as a runaway award. Mr Silva who himself was an experienced defendant's attorney (and who in his firm had access to a considerable wealth of advice against which to check his views) was of the opinion that the Piper Alpha tragedy was just the sort of situation that would tempt a jury to make a high award (and all that of course is on the assumption that they would not be invited to add-on punitive damages). The views of Mr Greene to the effect that lower awards than those of Mr Fisher were to be expected reflects of course a possibility but I should consider that the probability is that a jury would award no less than the figures assessed by Mr Fisher and possibly substantially more. I formed the view that Mr Fisher would operate very effectively as a plaintiff's lawyer before a jury. Thus OPCAL were entitled to assume that they were likely to encounter attorneys of the quality of Mr Fisher and that such would be well placed to secure for their clients the kind of awards that Mr Fisher spoke of. 11.6.9. Interest on Claims With regard to interest on the claims the pursuers were content to restrict interest to run from the date of citation. The date of citation in the Robert Carroll case is 21 September 1990,in the William Cowie case 8 November 1990, in the John Duncan case 3 June 1992, in the Graham Whyte case 2 February 1990, in the O'Shea case 9 January 1990, in the Pyman case 3 June 1992, and in the Andrew Carroll case 1 July 1992. The rate requested was the judicial rate which is 15% from citation until 31 March 1993 and 8% thereafter. There was no opposition to this. It should perhaps be noted that no interest was paid on the settlement amounts because they were lodged in interest bearing accounts as soon as the amounts were vouched. 11.7. Tax Relief In the test cases this point only arises in relation to the injured victim, Andrew Carroll. The matter arises because the defenders aver in their pleadings that in the case the pursuers and Participants received tax relief in respect of royalties, corporation tax and petroleum revenue tax. The pursuers for their part accept that they (but not the other Participants) received a measure of relief from petroleum revenue tax in respect of the compensation payments they made to Andrew Carroll. The whole issue arises because due to a gap in their insurance cover amounting to approximately $19 million OPCAL required to settle a proportion of their own liability to claimants out of their own funds. In the case of Andrew Carroll the contribution towards the claim paid out of their own funds was £15,300 (this sum originating in interim payments made to Mr Carroll). Despite the limited nature of their admission on Record in respect of that payment the pursuers claimed and obtained relief for petroleum revenue tax, corporation tax and royalties. This means that if the pursuers recover in the present action relating to Andrew Carroll they will have to account to the Revenue authorities for the relevant portion of the recovery. At the time the pursuers obtained their relief the rate for petroleum revenue tax was 75% and for corporation tax 35%. However there has since been a change in these tax rates so that if the pursuers recover in the present action they will require to pay back tax and if the payments are at the current rates this will be 50% in

the case of petroleum revenue tax and 33% in the case of corporation tax. The pursuers also recovered interest in respect of the delay in repaying them their relief. This will not be repayable to the Inland Revenue by the pursuers even if in a different revenue year they require to account for more tax in relation to the same earlier matter. This is because the tax now payable would only become due in the revenue year when relief for the damages paid out was recovered. It also has to be noted that when a party occurs legal liability but a third party such as an underwriter meets this, the party originally liable does not receive tax relief. OPCAL were covered for liability for losses such as occurred after the disaster by a series of layers of insurance. The witness Mr Payton explained in considerable and complex detail how the insurance gap (which was known in the relevant insurance circles as "the Oxy Gap" and which I have earlier referred to) arose and I have no difficulty in accepting his evidence in this regard. The effect of the Gap was to create a layer of no insurance in respect of liability between $81 million and $100 million. The defenders did not dispute the existence or quantification of the Oxy Gap. The witness Mr Goodhill, a director of a firm of marine claims consultants who assisted in respect of the Piper Alpha claims, gave acceptable evidence of certain payments which were made to Andrew Carroll which fell within the Oxy Gap. The practice adopted at the settlement was that as each claim became verified it was paid out of the insurance layer, if any, applicable at the time of payment. Thus once the various layers of insured cover were exhausted OPCAL had to make the payments themselves until another insured layer was reached. With regard to the tax implications of the payments made by OPCAL to Mr Andrew Carroll to cover the Gap, evidence was led by the pursuers from the witness Mr Bland. He was a graduate in history from Oxford University and when he gave his evidence he had acted as Director of Taxes for the pursuers since January 1990. From 1960 until 1982 he had been an Inspector of Taxes with the Inland Revenue having worked with them in the Oil Taxation Office. He had also worked in private practice as an Accountant in the same area of Tax. I was left in no doubt that he was well qualified and experienced in respect of the taxation of oil production. There are three Government taxes or charges imposed on oil production namely, a Government royalty charged at 12.5 % on the value of production of oil and gas, a petroleum revenue tax, and corporation tax. The royalty is payable as a condition of the Licence. The value on which royalties are charged is the value of production returned for the purposes of the petroleum revenue tax. A percentage of the expense of conveying and treating the oil or gas is allowable as a deduction for the purpose of computing the amount of the royalties, the percentage in the case of Piper Alpha being 70% in respect of capital expenditure and 60% for operational expenditure. Then the royalties paid are themselves deductible for the purpose of computing the petroleum revenue tax. Petroleum revenue tax is derived from the provisions of the Oil Taxation Act 1975. The tax is charged on profits from oil production (such profits being as defined in the Act) and the tax is chargeable by reference to six monthly chargeable periods ending at the end of June and December in each year. In terms of Section 2(2) of the said Act the assessable profits (or loss allowed) for the purposes of the petroleum revenue tax is the difference (if any) between the sum of the positive amounts for the period and the negative amounts for the

period. There is an assessable profit if the sum of the positive amount is greater than the negative amount, and otherwise there is a allowable loss. The main positive amount in relation to a particular oilfield is the value of oil and gas production as valued under the Act and the positive elements would also include royalty credits arising from repayments of royalties. In other words benefits received within a period by the taxpayer are treated as positive elements and taxable. The main negative elements in relation to the oilfield are allowable expenditure deductions and allowances. These in terms of Section 3 of the Act relate to what could be described as the costs of exploration, appraisal, development (including the capital costs of major equipment requirements such as the platform) and the production costs of winning the oil. A royalty debit would also be a negative element. The oilfields are delineated by the Licence applicable to each and the relevant field in the present case is Block 15/17. The Return for petroleum revenue tax is made at the same time as the royalty Return so that appropriate account can be taken of the royalty position. Corporation tax is assessed broadly on the trading profit of the company and is assessed on an annual basis. Petroleum revenue tax is an allowable deduction for corporation tax. The relevant statutory provision is section 500 of the Income and Corporation Tax Act 1988. When OPCAL required to pay claimants out of their own funds because of the Oxy Gap situation they claimed allowances in respect of these payments for petroleum revenue tax, royalties, and corporation tax. In relation to petroleum revenue tax, OPCAL claimed relief for the second half of 1988 on the basis of the company's estimate of its total Gap liability. This was on the view that the settlement figures were a negative element as being part of the cost of winning oil. Thus the amount of relief claimed was considerable reflecting as it did the amount of the Gap which was approximately $19 million. In terms of section 7(1) of the Act allowable negative relief will not in the first instance be set off against the profits of the current period but will be carried forward to be set off against the assessed profits of succeeding chargeable periods unless a claim is made under subsection (2) to be allowed to set off the relief against the profits of the preceding chargeable period. If this does not exhaust the relief then it can be set off against earlier periods. OPCAL exercised their option under subsection (2) and because their oil production effectively ceased after the accident the relief was carried back over several earlier periods. Indeed because of redevelopment costs the profits of 1988 were entirely eaten up. This whole situation has given rise to an issue in the present case. In the present case the costs of settling the claims in respect of the Gap were allowed against royalties to the extent of 60% (the applicable capping figure) as a cost of "conveying and treating" the oil. In October 1993 royalty relief was allowed for the chargeable period which represented the second half of 1993 and the 60% of costs allowed were referable to a royalty rate of 12.5 %. Thus relief was in effect 7.5% of the costs incurred. The royalty relief was given as a royalty credit. In the Carroll case the effective relief for royalty was £1,149.75. The full amount of the Gap payment was allowed for petroleum revenue tax purposes. Since the full amount of royalty payments is allowed as a relief for petroleum revenue tax and corporation tax when as here the royalties themselves are reduced, this reduction should be calculated into the tax computation but this was not done because at the stage when OPCAL obtained petroleum

revenue tax relief they had not at the time been allowed their royalty relief. However the position is that the allowance of royalty relief means a corresponding increase in the level of both taxes. The petroleum revenue tax rate at the time the relief was allowed was 75% but by 1993 when the royalty credit was allowed the rate had been reduced to 50%. Thus in fact once royalty relief is allowed, the petroleum revenue tax should be increased by 7.5% of 50% which is 3.75%. Moreover the Gap payments were claimed as a relief from corporation tax. This corporation tax relief has in principle been allowed but certainly at the time when Mr Bland gave his evidence the Inland Revenue were still questioning the period to which the relief should be applied. With regard to the increase in corporation tax because of the allowance of royalty relief the royalty saving is again 7.5% but the situation is complicated by the fact that petroleum revenue tax is itself an allowable deduction for the purposes of corporation tax. This means that the corporation tax profit is increased by 3.75 % in respect of royalty saving. With corporation tax at 33% the increase in corporation tax is 1.24%. The combined increase in the two taxes is therefore 4.99% of profit. Since the original royalty saving was 7.5% deducting the increased liability for taxes gives rise to a net royalty saving of 2.51 %. The net petroleum revenue tax saving works out at 48.75%. The total relief arising from the Gap payments is 86.26% being the total of net royalty relief at 2 5%, petroleum revenue tax relief at a net 48.75% and corporation tax relief at 35%. Thus 86.26% of the gap payment to Mr Carroll is £13,223.65. If the tax rates had remained unaltered over the relevant period then the Pursuers would have in the event of recovery paid back the same as the benefit they received and there would have been no loss or gain. In the event however the tax rates fell so that the pursuers if charged at current rates will pay back less than the benefit they received from their reliefs and a question arises as to how that should be treated. Whereas OPCAL received relief in respect of the gap payment to the extent of 86. 26%, repayment of tax at current rates would represent 69.01% of the gap payment. The Joint Minute of the parties assumes for calculation purposes that taxes will remain at the current rates and that, if the pursuers recover the amount of the gap payment for Carroll then, if the repayment were to be subject to tax at current rates, the tax would total £10,579.20. Thus the difference between the relief received and the taxes repayable would be £2,644.42 to the advantage of the pursuers. The question of a possible benefit to the pursuers in respect of interest was also raised and when this was raised by the defenders in evidence there was an objection by the pursuers on the basis that although the defenders had raised the matter of tax repayments in their pleadings they had not raised the matter of interest. I reserved the objection and in their submissions the pursuers insisted upon it. However the defenders in their pleadings aver that the pursuers obtained relief in respect of royalty, petroleum revenue tax and corporation tax and call upon the pursuers to specify such relief. It is fair to say that the defenders do not aver specifically in what way any interest should be treated but this is fundamentally a matter of law. In my view it is made clear to the pursuers by the defenders in their pleadings that the question of any benefit received in respect of the tax implications of their original payments has been put in issue and that would include the consequential interest. The pursuers should be in a position to know the net benefits, if

any, which they received to offset the loss they are claiming. In particular the pursuers contended that had they had notice of the defenders' case in respect of interest they could have considered leading evidence as to how the Inland Revenue would have treated interest but I think it was incumbent upon the pursuers to investigate the full tax implications for them of any benefits received by them in respect of their gap payments. It should be noted that payments made by the Inland Revenue which are in essence interest for overpayment of tax are referred to as repayment supplements. The pursuers argued that the repayment supplements received by them were in respect of tax overpaid according to the circumstances then applying. If the pursuers had not paid more tax than was then due they would have enjoyed the benefit of the sums overpaid and been able to earn interest on it. Any tax which the pursuers will require to repay if they recover in these actions will be treated on a "year of receipt" basis and will only become due and payable in the tax period when the recovery occurs. Until such time as any repayable tax has to be accounted for, the pursuers were entitled to the benefit of amounts involved and such benefit is not properly a benefit referable to the tax reliefs. On the other hand whereas it is assumed that the revenue will accept tax payable on a "year of receipt" basis this cannot be taken as certain until it happens. If the Inland Revenue were to claim interest on tax repayable on the basis that it was due from 1987 the pursuers would require to pay interest that would wipe out any possible benefit from the reliefs they obtained. The pursuers also contend that if the pursuers had paid out under their indemnity when the accident occurred then any sums due to the Inland Revenue would then have become payable and no question of interest would have arisen. Moreover the pursuers would have had the benefit of their recovery in 1988 whereas as matters have turned out the defenders have had the benefit of retaining the sums due under the indemnities until now. If the defenders had met any indemnity obligation timeously then there would in effect have been no gap. The pursuers only had the benefit of tax relief because they had to pay out money that should properly have been paid by a third party. The indemnity is in effect the equivalent of insurance (this submission was made before the pursuers appreciated that they would require to address the Contribution point I shall discuss in the next Chapter). Thus any benefit which the pursuers may or may not obtain through the effect of tax relief is not a failure to minimise the loss they sustained as a result of the accident but due to the steps they took to minimise their loss resulting from the delay of the defenders in meeting the indemnities. It was claimed that the pursuers were entitled to seek to arrange their tax affairs to their best advantage. If the indemnifiers had paid under the indemnities at the proper time they would not themselves have had the benefit of any tax reliefs such as were available to the pursuers. Any reliefs available to the pursuers in respect of their tax position are not such as the indemnifiers can claim by way of subrogation. Moreover if at the time when any recovery actually takes place the Inland Revenue, because of tax changes, are able to claim repayment of reliefs at a higher rate, the defenders would scarcely be liable to reimburse the pursuers. It is not clear upon what basis the defenders would have been liable to reimburse the pursuers for any loss consequential upon the manner in which they arranged their tax affairs. It should perhaps be noted that in order

to bring the Oxy Gap into operation the pursuers in these actions would require to establish as a fair settlement at least 44.22% of the sums sued for. If the settlement figures should have been less than that percentage of the sums sued for the gap liability of the pursuers would not be reached and no tax questions would arise. The evidence from Mr Payton was clear and unchallenged that if the settlement figures were reduced the insurers' liabilities would be reduced from the top down. With regard to the interest issue which arises the precise circumstances under which repayment supplements arose are of course dependent on the nature of the claims for relief when considered against OPCAL's profit or loss position over the relevant years. In this respect the situation is set out at length and agreed in the Joint Minute (no. 166 of process) and I shall not repeat the details since they do not affect the issues which I have to decide. In their submission the defenders urged me to adopt the approach prescribed by British Transport Commission v Gourlay 1956 AC 185 and in this connection I was also referred to Stewart v Glentaggart 1963 SC 300 . The foundation of the defenders' contentions was that a party can only recover actual loss under an indemnity and I was again referred to Comyn Ching . British Transport Commission is of course a foundation case and holds in effect that a judge in assessing damages should take tax factors into account in computing the actual loss. Thus one looks at actual loss and not notional loss. I agree with that generality. Earl Jowitt in his opinion observes that in carrying out the exercise of estimating tax consequences the Court may sometimes have to resort to a rough and ready approach. It is also a central point of the case that the incidence of tax on a loss cannot be described as too remote. It may be that in this case the computation of tax imposition may be more difficult than in some but the fact remains that we are dealing with legal rights and liabilities because tax is imposed by law. Lord Goddard also makes observations that may have a bearing on the present case where at page 208 he states " The task of determining it (the tax position) may not always be an easy one, but it is to be hoped that the parties, with the help of accountants, will be able to agree figures. If not the court must do its best to arrive at a reasonable figure even though it cannot be said to be an exact one". The next case I was referred to was Levinson and Ors v Farin and Ors

(1978) 2 All ER 1149 . In that case where there had been a sale of a business the defendants, in relation to a breach of a warranty, were able to obtain a tax advantage because they were able to offset loss against future profits. The case is one where a tax credit is taken into account rather than a tax deduction as in British Transport Commission . In Levinson the tax benefit was deducted from damages. West Suffolk County Council v W Rought Ltd 1957 AC 403 was a case involving compulsory purchase where British Transport Commission was applied. It is clear from the cases I have cited that the general rule of law that the onus rests on the pursuer to prove loss applies to this aspect of loss as to others. However in Cockburn & Company v Scottish Motor Omnibus Company Ltd 1964 SLT (Notes) 7 the Lord Ordinary observed that although the onus rests on the pursuer, the pursuer need not negative tax benefits in every case. It is for the defenders to raise the issue in their averments if they wish to found on it. I think the implication of the case is that the

defender must put the pursuer on notice that he must prove his case in respect of tax principles as well. In fact as I have mentioned in the present cases the defenders did make certain averments relating to the implications of tax benefit. The defenders of course accepted that a lot of the relevant factual detail had been agreed in the Joint Minute number 135 of process in the Stena Offshore action. The pursuers asked me to consider Casstellain v Preston and Others 1883 QBD 390 . The rubric notes that "According to the doctrine of subrogation, as between the insurer and the assured the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract fulfilled or unfulfilled or in remedy for tort capable of being insisted on or already held insisted on, or any other right, whether by way of condition or otherwise, legal or equitable which can be or has been exercised." (that part of the rubric comes from the judgment of Lord Justice Brett). A vendor had contracted to sell a house which he had insured against fire. The house was damaged by fire and he received the insurance money from the insurers. The transaction was completed and the vendor received the price of the house without allowance for the fire damage. When the purchasing company sued for the benefit of the fire insurance it was held that it was entitled to recover this from the vendor. Lord Justice Brett said in his opinion that the very foundation which has been applied in insurance law is that the contract of indemnity contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against him, shall be fully indemnified, but shall never be more than fully indemnified. That he said is the fundamental principle of insurance (these dicta may also reflect on the matter of contribution which I shall be considering in the next chapter). What the pursuers contended was that any benefit which the pursuers obtained through the tax issue is something which would pass to the indemnifiers under the rights of subrogation and cannot arise until they have met their obligation. It is therefore premature to decide the matter of tax benefit at this stage. It was said that the Court does not know what the benefit will be when the Court issues its judgment for the tax regime may change. It seems to me that at the point when the indemnifier makes payment he is entitled to the advantage of any diminution of OPCAL’s loss as at that point. The issue is one of estimation of the pursuer’s true loss and looking to the reality of the tax position insofar as the matter can be assessed the pursuers will have obtained a benefit from the revenue laws which will have reduced their loss at the accident. The pursuers contend that the defenders can have no entitlement to the benefit derived from taxation other than by way of subrogation because it is a right personal to the pursuers. However many factors which may limit loss are personal rights. It all remains a question of calculating actual loss. In Gourlay the pursuer had not lost the value of all his salary because if it had been paid he would have had to pay certain tax. In the present cases had it not been for the accident OPCAL would have had to pay certain taxes and impositions which they have saved and the question now is to calculate these savings. The pursuers argue that the measure of the loss which OPCAL have suffered is merely what they have paid out in settling the claims but I do not think that loss can be dissected in this manner. The overall position has to be considered. Otherwise OPCAL will be benefiting twice which is the very

situation which Lord Justice Brett deplores. The pursuers argue that unlike the Gourlay situation theses actions under indemnities are not actions for damages but actions for debts. However this ignores that the measure of the debt is the measure of OPCAL's loss. The pursuers argued that if the indemnity had been implemented at the time of the settlement which would have been consistent with the indemnifiers' obligations then there would have been no tax benefit. The defenders should not secure a lower total payment by their delay in meeting their obligations. However the indemnity like payment of any loss can only become payable when the loss crystallises and its amount is determined. Thus in the present cases there were serious disputes about the amount of the debts including questions such as the need to take account of Texas rates of damages. The pursuers argued that there was no satisfactory evidence that the Inland Revenue would attribute the indemnity payments to current tax years so that the pursuers may be accountable for tax at the original rates. I was referred to Spencer v Macmillan's Trustees 1958 SC 300. In that case questions were raised as to whether in the absence of the Inland Revenue the Court would answer a question as to the circumstances in which they would exact Tax. Certainly in Gourlay there was an agreed Tax position and in West Suffolk County Council there was a letter from the Inland Revenue which the Court acted upon. However Mr Bland gave evidence that given that the legislation says that there has to be an accounting if damages are recovered he would account to the Inland Revenue on behalf of the pursuers in a year of receipt basis as indeed is his practice in such circumstances. He added that this procedure had in the past been accepted by the Inland Revenue in another case. He was highly experienced in tax matters and the defenders led no contrary evidence. When the only relevant accounting evidence from an experienced accountant is that is to the effect that the amounts under discussion should properly be accounted for in the year of receipt and that this procedure has actually been accepted by the Inland Revenue in another case then on a balance of probabilities I am prepared to conclude that there would be a year of receipt assessment. This also seems to accord with the terms of the legislation. Spenser is rather a different case for there it was being contended that the Inland Revenue were not likely to tax certain payments. The pursuers further referred me to the case of General Mining and Engineering Services v Mine Safety Appliances Ltd. 1976 SLT 28. The case relates to the prospective taxation of Royalty receipts and I do not find its facts and the presumptions spoken to by Lord Dunpark who decided the case very germane to the present case. It is accepted by the pursuers that they received some specified tax benefit in respect of the losses they paid out of their own resources. In these circumstances it is essentially the pursuers who have the interest to establish that, if they now recover under indemnities, some of the tax rebate will have to be refunded. Without that being the position prima facie they have benefited. Thus there are strong arguments for saying that it is for the pursuers to show how much of the rebate they have received will have to be paid back. However as I have suggested the matter does not require to be decided on the basis of presumption. I think it was definitely established in these cases that a material albeit minor portion of OPCAL's settlement outlay was funded by their own resources because of the Oxy Gap in their insurance cover. However of the cases before me only the

action relating to Andrew Carroll involved finance by the pursuers rather than by insurers. Mr Carroll in fact received four interim payments from OPCAL's own funds and these are detailed in the said Joint Minute. As far as regards claims met by insurers they afford no opportunity for tax advantage so they can be ignored. OPCAL has obtained relief in respect of the Gap payment for all of the said three applicable taxes. It was I think accepted that the combined reliefs enjoyed by OPCAL represented 86% of the Gap payments in the Andrew Carroll case. Thus OPCAL were in fact only out of pocket to the extent of 14% of what they paid to Mr Carroll in respect of Gap payments. Thus the benefit they obtained was £13,223.66 being 86 % of £15,330. However assuming that the pursuers recover, the benefit they have received will have to be reduced by the amount of tax they will have to repay in that event. The pursuers accepted that they would have to repay some tax. As I have already observed taking into account the present rates of taxes Petroleum Revenue Tax has been reduced from 75% to 50% and Corporation Tax from 35% to 30%. This would mean as the witness Mr Bland worked out the combined rate of tax would be 69.01%. On that basis the total tax which the pursuers would pay would be £10,579.3 That figure of course presupposes that the pursuers will repay tax at the present rates. Were this so, as I have earlier observed, on these figures the net benefit which the pursuers would receive in respect of Mr Carroll would total £2,644.43. Of course although my consideration of this matter is confined to the Andrew Carroll case in respect of the other Oxy Gap payments which OPCAL have made the tax question is likely to involve a considerable amount. Because OPCAL paid certain taxes, later because of their claim in respect of Oxy Gap payments, the taxing authority, at the time OPCAL accounted to them for these retrospectively, allowed OPCAL sums equivalent to interest on the basis that OPCAL had been out of pocket for a time in respect of money later found not to be due. This interest will not require to be repaid if the pursuers recover their loss and have to account for at least part of their tax benefit. The defenders claimed that the interest also represents an advantage that should be taken into account like the other advantages. The said interest in fact became payable to OPCAL under statute namely paragraph 16 of Schedule 2 of the Oil Taxtion Act 1975. The defenders accepted that the interest question should be resolved on the basis of figures agreed by the pursuers which brings out a value for the interest received. The computation of the interest benefits originally raised a number of issues of considerable complexity and difficulty. The issues are set out in the Joint Minute. Fortunately the defenders ultimately compromised and accepted the pursuers' basis of computation. This it was said was not an acceptance that the pursuers' calculations were right but rather a pragmatic compromise arrived at for practical reasons. I think that at the end of the day the defenders are correct in suggesting that allowance must be made for tax advantage enjoyed by OPCAL in respect of the Andrew Carroll case. On the other hand I think that they were wrong in claiming that the interest received by OPCAL fell to be regarded as a benefit. The starting point must be the by now well established rule that a party is only entitled to recover the net loss actually sustained. This is the clear import of the authorities that are referred to above. OPCAL had to pay out from their own resources the interim payments to Mr Carroll so that this is the first element to be considered in

respect of their loss. However they were not out-of-pocket to the extent of the full sum paid to Mr Carroll. Because of their outlay they were able to save on their tax bill in respect of Petroleum Revenue Tax, Corporation Tax and Royalties. I can see no reason why these benefits should not be taken into account to counterbalance their outlay to Mr Carroll. If the law had not provided for repayment of tax on the recovery of the sum paid out by OPCAL then there could have been little problem. OPCAL would have had to account for the full value of the tax advantage. However it is averred and I think proved that OPCAL will be required to pay back to the taxing authority at least some of their tax advantage. Given that OPCAL at the moment are enjoying the whole advantage prima facie they have had a benefit which reduces their loss and, if they claim as they do that the indemnities cover them, that this benefit will in fact be reduced by repayments to the taxing authority, it is for them to prove this. They are in fact claiming an enhancement of their present loss. I have already referred to some of the arguments which the pursuers advanced to support their claim that the defenders require to establish a subrogated right to OPCAL's revenue benefits and that the claim to have these taken into account is premature. However as I think I have earlier made clear I cannot accept these. Various arguments were presented to me aimed at showing that variations in tax rates are just an incident of a party's tax position and should therefore be ignored. It was also claimed by the pursuers that it was not possible to say when any tax repayments would be required or what the tax will be at the time. Of course it is impossible to establish what the tax rate will actually be when OPCAL would require to pay back tax but as the above authorities show the Court must do its best to arrive at a realistic amount. It seems to me that the probability is that any repayments will be at or current tax rates. If one does not adopt this approach the it might be argued that the pursuers have not proved that they will suffer any reduction in their advantage at all. The upshot is that any award to the pursuers in the Andrew Carroll case should be reduced from the settlement terms by the sum of £ 2644 .43. The interest represents quite a different problem. Under the legislation, tax obligations and benefits arise at particular times. If a party accounts for tax which subsequent developments show has been unnecessary or in any event premature he gets interest to compensate him for an outlay that was not at the time justified. This is not an absolute benefit since the supposition is that if he had been able to retain the tax he would have had the benefit of the money which could itself have earned interest. Even if the tax is shown to be properly payable under the rules there is a system for its collection and repayment and if the taxpayer does not get such advantages as these rules confer he is deemed to have been deprived of the use of money and under statute gets compensatory interest. If the pursuers' actual payment of tax has to a degree been delayed this is due to the defenders who (were their liability to be established) have delayed the resolution of the tax situation. In any event the details of that particular aspect of the matter were not explored. I am not satisfied that the pursuers obtained any benefit from interest payments since this interest was in effect compensation for funds which at particular times under the rules of the tax system they had been deprived of incorrectly. 11.9 Equal Treaty Rights An issue arose as to the rights of foreign nationals to claim before Texas Courts in respect of delicts committed

outside Texas and in a foreign country. There was no dispute that such foreign nationals would have required to pursue their claims under the terms of Section 71.031 of the Texas Civil Practice and Remedies Code. This provision states: "An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country if: (1) A law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury; (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens." The defenders have taken issue with the rights of the claimants to pursue their claims in Texas on the ground that the claimants would not have been able to satisfy the requirement of paragraph (3) in regard to equal treaty rights. The issue of equal treaty rights was not raised by the defenders in their pleadings. Professor Weintraub dealt with the matter when he gave evidence in May 1993 and he raised it as a question simply to dismiss it. His view was that the treaty rights question should not prevent the claimants from securing jurisdiction in Texas. He observed that it was perfectly obvious that the United Kingdom in fact accords open access to British Courts to American citizens and he thought that it would in fact be unconstitutional for the Texas Courts to attempt to construe Paragraph (3) literally and say that there must be a formal treaty. He considered that the paragraph was just a reflection of the open courts provision of the Texas constitution. In this regard he referred to the case of Chick Kam Choo v Exxon Corporation 486 U. S. 140. Professor Weintraub's views on equal treaty rights were not challenged when he was cross-examined. The matter of equal treaty rights was only focused as an issue when more than a year after Professor Weintraub had given his evidence the defenders' witness Mr Kilgarlin gave evidence to the effect that in his view the claimants would not have been able to satisfy the requirements of paragraph (3). The matter had arisen shortly before by way of an objection by the pursuers when the defenders in October 1994 sought leave to lodge some cases relating to the matter. The pursuers claimed that there had been no notice of the matter of equal treaty rights on record or otherwise. I allowed the documents to be lodged and Mr Kilgarlin's evidence subject to reservation of the objection and also subject to a right of the pursuers to lead evidence in replication should they choose to do so. They did in fact exercise this option and led Professor Baade. Professor Baade was an eminent expert whose specialist knowledge and experience extended particularly to Equal Treaty rights. For an expert who had only been instructed at the last minute it is perhaps notable that his evidence lasted four days. Thus the pursuers in the event had the opportunity to lead what they claimed was good evidence about this aspect of the case. Nevertheless the fact remains that the views of Mr Silva, Mrs Sondock, Mr Fisher, and Mr Crain - all Texas lawyers - were not canvassed in their evidence. Furthermore insofar as the evidence may be left in any ambiguity because the relevant topic was not raised with earlier witnesses because of the lack of notice, I consider that the pursuers should get the benefit of any doubt. I shall raise this where it arises. Mr Kilgarlin's view was that the

provision with regard to equal treaty rights requires that at the relevant date in 1988 there should have been in existence between the United States and the United Kingdom a formal treaty specifically allowing free access to the courts of each of these countries. Professor Baade considered that there were a number of treaty provisions between the countries concerned which taken together gave rise to a sufficient inference of free access to courts to satisfy paragraph (3). He also thought that free access to courts was specifically provided for in a treaty between the countries known as Jay's Treaty although there was some doubt as to whether that treaty was still in force. Professor Baade's main argument is that what the Texas Courts would in fact do is to look to what happened in practice rather than concentrate on the formal position, the governing factor being actual reciprocity of treatment. On the whole matter the pursuers' position was that even on the worst view for them the consortium were entitled to the prospect of Texas proceeding as a serious threat to them because, on the equal treaties question, there was at the very least a serious risk that a Texas Court would have held paragraph (3) to have been satisfied. Moreover if in 1988 the consortium had raised the matter specifically with well qualified experts like Professor Weintraub and Professor Baade they would have been advised that the equal treaties provision would not in reality prevent Texas proceedings. Indeed the consortium were in fact advised by a number of well-qualified experts with practical experience of litigating in Texas but not one of them would have appeared to have raised the question of equal treaty rights as a problem. Of course those who gave evidence were not asked about it by the defenders. In addition it seems clear that a number of highly experienced plaintiffs' lawyers were prepared to raise proceedings in Texas and one can presume that they would not have contemplated doing so if they feared that the actions were likely to be dismissed at a preliminary stage to the peril of their contingency fees. In the Busse case which was in Court in Texas for several years there was no suggestion that equal treaty rights had been put forward as a defence. It should be further noted that Professor Weintraub did refer to equal treaty rights in his Report dated December 1992 and this was made available to the defenders some months before the Proof began. The defenders say that it was only after Professor Weintraub had given his evidence that they gave mature and leisured reflection to the question of equal treaty rights. I can accept that this is factually correct but it is by way of an explanation rather than an excuse especially if account is taken of Mr Kilgarlin's evidence that he had raised the point about equal treaty rights in his initial letter to the defenders in December 1992. With regard to the respective qualifications and experience of the experts who gave evidence on equal treaty rights I have already commented upon those of Professor Weintraub and Mr Kilgarlin. However it has to be noted that Mr Kilgarlin was first exposed to the whole question of equal treaty rights in 1992 when he became involved in the case of Owens-Corning Fibreglass Company v Baker 838 SW 2d 838 (1992). Professor Baade on the other hand has been interested in the question since 1974 (with a particular interest in Paragraph (3) since 1987). He has given a considerable number of affidavits and consultations on the topic. Professor Weintraub's specific interest in equal treaty rights was not explored with him because as I have indicated the matter was not then raised as an issue. However it is to be noted that he was

involved in the re-drafting of what became Section 71.031 to the extent that it became known generally as "Weintraub's Act". It has to be noted also that the equal treaty rights provision has by way of a number of enactments been in force since 1913 and that it has never been successfully invoked to deny access to Texas Courts to a United Kingdom citizen. Thus in 1984 in the case of Couch v Chevron there was a case in Texas relating to the alleged wrongful death of a Scottish seaman and the matter of equal treaty rights does not appear to have been raised although if the present defenders' arguments were valid it would have been a complete defence. The case of Owens-Corning Fibreglass Company was a case involving Canadian citizens where certain workmen had been injured by exposure to asbestos in Canada. The case was for claims arising out of personal injuries and had come before the Court of Appeals in Texas. The Court decided that there was jurisdiction because a number of treaties existed between Canada and the United States granting rights of access to courts and substantive rights to the citizens of each of the concerned countries. This had been the position taken by the judge of first instance who had held that the equal rights provision was not a bar to trial where there were a number of treaty provisions which showed that in general equal access to courts was allowed by the countries concerned. Professor Baade agrees with this interpretation of the decision of the judge of first instance and indeed this decision was consistent with the arguments presented by Mr Kilgarlin himself when he appeared in the Owen-Corning case. It also has to be noted that as a result of appearing in the said case Mr Kilgarlin had by June 1992 given serious consideration to the issue of equal treaty rights and indeed he was in court when Professor Weintraub gave his evidence. A case with possible implications for the treaty rights question is Dow Chemical Company v Castro Alfaro 786 SW 2d 674 (1990) a decision of the Supreme Court of Texas. Mr Alfaro, a Costa Rican, and others, had sued the Chemical Company on the ground that they had suffered injury through being exposed to pesticides in Costa Rica. The actions were pursued under Section 71. 031. There is a treaty dated 1851 between Costa Rica and the United States which is of the type known as a Treaty of Friendship, Commerce, and Navigation and this specifically provides for reciprocal free access to the courts of these countries. The fundamental issue in the case was the availability of the doctrine of forum non conveniens in the Texas Courts and it was declared that this did not apply in Texas (much to the displeasure of Professor Weintraub). However in his judgment Justice Gonzalez holds in effect that the purpose of the legislation leading up to section 71.031 (the Acts of 1913 and 1917) was to try to abolish the Dissimilarity Doctrine. Indeed he cites Professor Baade's works to support this view. The Dissimilarity Doctrine in terms of its relevant application was to the effect that Texan Courts were without jurisdiction to entertain suits for wrongful death or personal injuries when the tort occurred in Mexico. Professor Baade himself in his evidence in these cases stated that the purpose of the 1913 legislation (the forerunner of Section 71.031) was to give American workers injured while working on Mexican trains a right of action in Texan Courts against American Companies who owned the trains. Professor Baade backed up his opinion on this by mentioning that the Bill which introduced the relevant provision was sponsored by Senator Hudspeth, a lawyer in one of the major railway towns close to the

Mexican frontier. Mr Kilgarlin gives the legislation different objectives but he did not have the detailed knowledge which Professor Baade had of the history of the matter. Mr Kilgarlin thought that the 1913 legislation had been aimed at the need to provided for an omission highlighted in the case of Maiorano which I shall shortly discuss. Professor Baade is also clearly of the view that there is no historic connection between the 1913 Act and Wrongful Death legislation in Texas - that is the Wrongful Death Act of 1860. Confusion on this point can arise because the 1860 Act was itself amended in 1913 although by an independent Act. However the case of Alfaro would seem to suggest that an equal treaty rights provision does require actual treaty rights although just what the essential requirement of such rights are is not explored. Mr Kilgarlin considered that his claim for a literal interpretation of 71.031 was supported by the decision in Francis v Herrin Transportation Company 432 SW 2d 710. The case supports the view that if in a wrongful death case there is a precondition of the right to pursue a case in Texas then that right must be satisfied before the Texan action is allowed. The prerequisite in the case was derived from a Texas statute which provided that before an action lay for a wrongful act in another state the law or statutory legislation of that other state must give a right to maintain an action and recover damages in that state. However while it can be said that Francis lays down a general principle it is difficult to see how it supports the view that 71.031 should be interpreted in any particular way. Indeed the case does not comment on the equal treaty right provision at all. Moreover in relation to personal injuries claims (which arise from what we would call common law as distinct from wrongful death actions which are based on statute) it was accepted by Mr Kilgarlin that to apply 71.031 literally to these would offend against the open courts provision of the Texas constitution (namely Article 1, Section 13 of the Constitution). The open courts provision says in effect that the Texas Courts will be open to everyone for injuries done to their person and lands. Professor Baade claimed that the Texas courts would seek to avoid an interpretation of the equal treaty provisions which would deprive wrongful death actions of the same kind of constitutional protection as would be enjoyed by personal injury cases and I have no reason to suppose that he is mistaken about this. In Sax v Votteler 648 SW 2d 661 (1983) which is a decision of the Supreme Court of Texas and was a medical negligence case, it was decided by Mr Kilgarlin (who then sat as a Justice) that a violation of the open courts provision was a violation of constitutional due process. The essential holding was that the right to bring a well-established common law cause of action cannot be effectively abrogated. Of course the reference in that case is specifically to common law rights of action. Nevertheless Professor Baade's view was that in applying 71.031 the Texas court would hesitate to arrive at a construction that reached opposite constitutional results as between personal actions and wrongful death cases. In Lucas v U. S. 757 SW 2d 687 (1988) a medical negligence question again arose and the issue was whether or not a limitation which Texas legislation had put on such cases was constitutional. The limitation was held to be unconstitutional by the Texas Supreme Court. The case was again a personal injuries case but the position of the court was that the critical point was whether the limitation provision was unreasonable and arbitrary when balanced against the purposes and basis

of the statute (the open courts provision). While the case is not directly in point it demonstrates that the Court will take a broad rather that a narrow view in respect of state legislation that seems to affect constitutional principles. If the position is as seems to be agreed that 71.031 would at least be at risk of being declared unconstitutional in relation to personal injuries cases the question arises as to whether the unconstitutional provision can be severed from the rest of the provision. According to Professor Baade the three dominant rules of statutory construction are that the validity of Texas statutes should be measured by the federal and state constitution, that the legislative intent is a governing factor, and that there is a presumption that the legislature does not intend to violate the constitution. These rules are also embodied in the Code Construction Act of 1985. The same Act in section 311.032 contains a specific provision governing the availability of severability. The stipulation provides at (c) that in a statute that does not contain a provision for severability or non-severability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given affect without the invalid provision or application, and to this end the provisions of the statute are severable. However to satisfy the rules spoken to by Professor Baade it would have to be sustainable that the legislature may have intended different rules about treaty rights to apply to wrongful death cases as compared with personal injuries cases. In connection with this matter the case of Rose v Doctor's Hospital 801 SW 2d 841 (1990) has to be considered. That case, (which was a wrongful death case) makes it clear that in the case of a statutory right such as a wrongful death action the open courts provision does not apply. The action was again a medical negligence case before the Texas Supreme Court. It has to be noted that the decision was reached on a bare majority of 5 against 4. The issue once more was the constitutionality of a limitation provision and the court held that the unconstitutionality which affected the personal injuries claim could be severed from constitutionality in relation to wrongful death. The majority of the Court said in relation to provisions of different constitutional acceptability that the important consideration is not whether they are contained in the same section but rather whether they are essentially and inseparably connected in substance. If when the unconstitutional portion is cut out, is what remains capable of being executed in accordance with apparent legislative intent wholly independent of that which is rejected. Professor Baade read Rose as emphasising that at the end of the day the test of severability is legislative intent. However what the court will not do is to rewrite the legislation so one must look at the legislation as it stands. The Court's function is restricted in practice to striking out and this Professor Baade claimed was made clear by the opinions in Rose . In his dissenting judgment Chief Justice Phillips expressed the view in Rose that there was no severability in the facts of that case. If in 71.031 the reference to personal injury was struck out the relevant provision would be left with having no significance for personal injuries cases and this could not have been intended. Professor Baade considered that the Construction Code Act merely lays down guidelines and does not affect the principle and that it is legislative intent which counts. He, as I have indicated, does not think that the legislative intent of the legislature was to

create a divided situation in respect of equal treaty rights. Firstly he refers to the original purpose of the act to provide relief for Americans on Mexican railways. Then he refers to the caption of the statute which is "Protection of Citizens of this State Injured in Foreign Countries" He does not think in the circumstances the legislature would have enacted the legislation for wrongful death cases alone, particularly as the original focus of the legislation was declared to be personal injuries. The great majority of accidents on Mexican Railways at or about the time of the 1913 legislation were personal injuries cases and few involved fatal accidents. Professor Baade uses these statistics to support his view of the legislation. However on the whole question of unconstitutionality Professor Baade thought that the Courts would seek to find a practical solution to resolving the question that did not involve holding any part of rule 71.031 to be unconstitutional. Professor Baade also seeks to have his views confirmed in the fact that Section 71.031 refers to "countries" enjoying equal treaty rights and not to "individuals" having such rights The defenders claimed that Mr Kilgarlin's explanation of the history of the equal treaty rights legislation got support from the case of Maiorano v Baltimore and Ohio Railway Company 213 US 268 (1909). This was an appeal arising out of Pennsylvania and it concerned a widow who was an Italian subject and whose husband had been killed in a railway accident in Pennsylvania. The question was whether the Pennsylvanian wrongful death statute gave rights to plaintiffs who were non resident aliens and the Pennsylvanian Court had held that legislation conferred no such rights on the families of deceased when they resided outside the forum state. The plaintiff sought to argue that there were treaty provisions between the United States and Italy which specifically provided for free access to the courts of each of these states and further that the wrongful death legislation should be construed as merely desiderating such access. The United States Supreme Court held that there was nothing in the case to take it out of the general rule that the interpretation of a state statute by the highest court of the state would be accepted by the Supreme Court. The existing treaty did not embrace the right that was claimed. Mr Kilgarlin opined that Maiorano was in the minds of the Texas legislature in 1913 and led to their adding an equal treaty rights provision to their wrongful death statute. However as Professor Baade pointed out this view is incorrect since the equal treaty rights provision is quite separate from the wrongful death legislation. In any event Maiorano deals with a wrongful death in Pennsylvania whereas the 1913 legislation covers a death that may have occurred in another state whether to Texas residents or to aliens. Thus the 1913 legislation would not have cured the particular problem that arose in Maiorano . In any event the point of the case was that the existing treaty was not to be held as applying to representatives who were not in the USA. That being so if Mr Kilgarlin's view of equal treaty provisions is correct then the 1913 Act would not have helped Mrs Maiorano without an extension of the existing treaty rights (otherwise there would have been no treaty giving the required reciprocal access). As it happens the existing treaty was extended about the time of the 1913 Act to cover the Maiorano type of case. However with the treaty extended there was no need for the 1913 Act to cure the Maiorano situation since if the treaty had been extended earlier Maiorano would probably been decided differently. Professor Baade

points out that the 1919 Act was originally introduced to the Texas legislature in 1911. The 1860 Act provided that in Texas there was no right to sue in respect of a wrongful death outside Texas. It specifically gave rights to relatives of a deceased not precluded by the legislation. Mr Maiorano suffered his accident within the forum state. Further the problem that arose in Pennsylvania would not have occurred under the law of Texas as it stood. This was the view of Professor Baade and although Mr Kilgarlin took a different position he did not justify it very satisfactorily. In addition it is clear that the Legislature of Pennsylvania in 1911 did not cure the Maiorano problem by enacting equal treaty rights legislation but by conferring a right to sue on representatives of those killed by accidents in Pennsylvania. Nevertheless the defenders referred me to the case of Liberato and Ors v Roger 270 US 535 (1926). The defenders suggested that the case showed that the purpose of the 1913 Act was to confer rights similar to those lacking in Maiorano . I am not sure that this case helps much. Professor Baade had some interesting observations to explain the equal treaty right provision in 1913. One derives from the reference to "equal" treaty rights. He asks why "equal" since treaty rights alone would have been quite enough. He explained that El Paso in Texas had a large population of Chinese immigrants many of them illegal. Apparently they caused quite a volume of litigation. Professor Baade explains that at the time China was one of the countries that had what were regarded as "unequal" treaty rights with America so that it is possible that the provision was worded as it was as a discriminatory measure against the unwelcome Chinese population. Another explanation is that the legislation was intended to exclude Mexicans (who were also numerous and unwelcome immigrants) since Mexico at the time did not afford protection to US citizens. I should hope that it is unlikely that legislation would be founded on such base motives but I suppose it is possible. However, as I think, Professor Baade recognised these theories as rather speculative and in that situation I shall ignore them. In the preamble to the 1917 Act (the follow-on from the 1913 Act) the preamble states that it is "an Act for the protection of citizens in this State, and in the United States and citizens of countries having equal treaty rights with the United States on behalf of its citizens". Mr Kilgarlin also relied for his historical analysis on the case of Willis v Missouri Pacific Railway Company 61 Tex. 432 (dated 1884 and a decision of the Texas Supreme Court). In that case a Texas resident sued in respect of a death in Indian territory where there was no established rule of law so that it could not be said that the deceased would have a right to recover where the accident has occurred - that is the double delict rule could not be applied. The point then is that a litigant cannot create a right of action in the forum state that he would not otherwise have had. Mr Kilgarlin considered that the 1913 and 1917 Acts were to cure a situation such as created a difficulty in Willis . However that legislation was not intended to affect the double delict rule and in fact did not do so. So far as the dissimilarity doctrine was concerned Mr Kilgarlin pointed out that this was only removed in 1979. The doctrine in its original form meant that there was no jurisdiction unless the substantive law of Texas and the plaintiff’s state were the same. However Professor Baade pointed out that before the doctrine was eliminated it had been watered down so that the concept "similar" became "substantially similar" and then "not too dissimilar". Mr Kilgarlin is less of a specialist

academician than Professor Baade and the historical perspective of the latter seems to be based on a more extensive study and to fit in better with the facts. Another consideration of course is whether a competent lawyer advising clients in 1988 would have advised that the equal treaties position could have provided a plausible defence to proceedings in Texas. In this regard I think the significant fact is that not one of the various experienced lawyers who considered the situation at the time thought of treaty rights as being a consideration. Professor Weintraub said in evidence that when in 1990 the case of Moreno v Sterling Drug Inc. decided that the open courts provision did not apply to wrongful death cases (again a narrow majority decision and decided in the same year as Rose) this came as a great surprise to the profession and could not have been anticipated in 1988. The citation is 787 SW 2nd 348 (1990). The surprise of the profession originated, as Professor Baade explained, in the fact that in 1988 it was strongly arguable on good authority that an action for wrongful death could be maintained at common law. Moreover in Rose , Chief Justice Phillips makes the point in his dissenting Opinion that in cases in 1988 and 1989 both federal and state courts were applying the case of Lucas to wrongful death cases. Professor Baade also advances two additional constitutional objections to the view on equal treaties advanced by Mr Kilgarlin. The first point is that this view would be likely to fall foul of the Equal Protection Clause of the United States constitution. The second objection springs from the exclusive jurisdiction of the federal government over foreign affairs. In his evidence Mr Kilgarlin agreed that if the United States considered that it was in the national interest to give equal protection to particular alien groups this could give rise to a federal issue although he claimed that he had not fully studied the matter. Professor Baade on the other hand thought that statutes restrictive of the rights of aliens are only constitutional if there is a compelling state interest behind the legislation. In this regard he referred to the 14th. Amendment of the United States Constitution that contains an equal protection clause. Indeed in dealing with the rights of what are referred to as "discrete insular minorities" the federal court will apply strict scrutiny. Thus 71.031 comes close to being unconstitutional unless it is interpreted in a non-literal manner. In the first instance the provision would be interpreted by the state Supreme Court but then it would be open to the federal Supreme Court to pronounce on the interpretation in terms of federal constitutionality. However Professor Baade accepted that the particular arguments he had been making in respect of this constitutional point applied with less certain force to non-resident aliens. A further extension of this argument was that the United States reserved to itself the right to regulate foreign affairs as it saw fit. This point was raised with Professor Baade and it was accepted that it had not been put to Mr Kilgarlin. However there is said to be a requirement on the part of a state not to interpret a statute in a such a manner as would interfere with the power and competence of the federal authorities to regulate international affairs. Professor Baade thought that this general principle applied at least to the extent that it requires an even-handed application of the relevant provision to be rational and generally compatible with United States practice and foreign law. Thus for example there can be nothing to prevent the United States entering into an effective agreement with a foreign state by executive action rather than by way of a formal treaty.

Indeed the practice of entering into general treaties of Friendship, Commerce and Navigation (to which specific equal treatment provisions were often attached) has been discontinued by the State Department. The literal interpretation advocated by Mr Kilgarlin was said by Professor Baade to be such as would lead to unequal treatment of different categories of foreign nationals and this would be looked upon with disfavour by the State Department. Unlike Mr Kilgarlin who would require a formal treaty specifically granting full access rights to the courts of the countries concerned Professor Baade thinks that the equal treaty rights provision of Texas law would be satisfied if there were treaties which granted such reciprocal rights as would permit a court to spell out that there was in practice a sufficient recognition of equal access rights to be equivalent to what is required by 71.031 - that is to say practical reciprocity. There can be no doubt that as a matter of practice United States citizens would be accorded free access to Scottish courts. Professor Baade stated that he had personally been involved in a case which he had to consider the position of equal treaty rights in relation to Mexico. There had been no formal treaty but the Texas court accepted in 1987 that equal treaty rights existed in practice. The case was unreported. However Professor Baade accepts that his position would be reinforced if there were some treaties regulating at least a degree of court access between the countries under consideration. When having regard to the treaties which exist between the United States and the United Kingdom (and to which Professor Baade made reference in expressing the view that effectively these amounted to equal treaty rights) it has to be noted that some of them were used by the court in Owens-Corning . Professor Baade relied upon the United Nations Convention on Civil and Political Rights which the United Kingdom became a party to in 1976. The United States on the other hand did not become a party to that convention until late 1992 but Canada adhered much earlier and the Convention was relied upon in Owens-Corning . Also referred to in that case were the Hague Convention on the Civil Aspects of International Child Abduction and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which the United Kingdom has been a party to since 1986 and 1975 respectively). A number of other similar treaties were also cited in Owens-Corning and as it happens the United Kingdom are parties to all but two. In relation to the problem before him Professor Baade relied upon the Convention between the United States of America and the United Kingdom of Great Britain and Ireland relating to the Tenure and Disposition of Real and Personal Property (1900). This treaty gives the citizens of the countries concerned reciprocal rights to dispose of real and personal property. The said United Nations Convention on Civil and Political rights provided that all persons shall be equal before the courts and tribunals. Despite the fact that the United States did not formally adhere to that Convention until 1992 Professor Baade thought that it was relevant to the question he was considering. In the first place it confirms the United Kingdom has an open courts policy and secondly if the Piper Alpha proceedings had still been in dependence in 1992 it would have been applied to the cases. If a condition is purely procedural (as Professor Baade believes the equal treaty rights provision to be) then the condition can be satisfied at any stage of proceedings. He explained that the Convention had received the support of both

political parties long before 1992 and that formal ratification had only been deferred because of pressure on the legislative calendar. Any American lawyer considering the position in 1988 would have expected the early ratification of the Convention. One problem is that I have no idea of the expectation of the negotiating parties in 1988 in relation to the ratification of the 1992 Convention because they were never asked. This of course was because the matter was not in issue. They may have had knowledge which would have suggested to them that at that time the ratification of the Convention seemed imminent. In Texas it could reasonably be anticipated that an important case like Piper Alpha would last many years (the average duration of such a case being six years). The Helicopteros case took 6 years and Alfaro took 7 years. Even before 1992 the United States could have called upon Britain to honour the Convention although it would have enjoyed no right of enforcement. Since the 1970s both the United States and the United Kingdom have been a party to a Convention providing reciprocally for the taking of evidence abroad in civil and commercial matters. This Convention is important in respect of litigation in the two countries. A further Convention between the two countries which affects litigation is that which was entered into in 1967 and provides for the reciprocal service of judicial documents in civil and commercial cases. Equally important is the said Convention on the Enforcement of Foreign Arbitral Awards which the United States has been a party to since 1975. A further Convention provides for consuls of the two countries being free to offer legal assistance and advice to their citizens in the country of the other. Given these treaties Professor Baade considers it to be inconceivable that any Texas Court would fail to recognise that the two countries afford equal access to the courts for each other's citizens and that where appropriate these arrangements are clarified by treaty or convention. In 1798 a treaty was entered into between the United States and the United Kingdom known as Jayes Treaty. This contained a provision for the enjoyment by the citizens of the countries concerned of open access to courts in each jurisdiction and met the standard of provision which Mr Kilgarlin thought necessary if the equal treaty provision is to be met. He claimed the treaty had been abrogated by the war of 1812. Professor Baade thought that although the matter remained controversial it was eminently arguable that the relevant provision of this treaty was still in force. He argued that the view is now gaining force in the United States that whereas treaty provisions such as those dealing with military alliances or political alliance are terminated by a state of war other provisions are only suspended and revive when the war ends. On the other hand Professor Weintraub in his short and unchallenged treatment of the matter discounted the applicability of Jayes Treaty and in a list of treaties in force issued by the United States State department the relevant provision of the Treaty (Article 3) is shown as no longer being in force (although it has to be noted that certain other provisions of the Treaty are shown as remaining in force and the reference to Article 3 is in guarded terms). Moreover there is in his view a firm practice to regard the 1923 Treaty of Friendship, Commerce and Navigation between the United States and Germany to be in operation despite World War 2. Mr Kilgarlin's main contention was that 71.031 required a treaty equivalent to a Friendship, Commerce, and Navigation treaty and specifically according equal access to the other's courts for citizens

of the Treaty countries. He maintained that at the time of the settlement there was no such treaty in force. Mr Kilgarlin in fact maintained that in 71.031 the wrongful death provision and the personal injuries provision would be severable. This was opposite to the view of Professor Baade who thought that the intention of the legislature could not possibly have been to enact the wrongful death measure as a separate provision. Mr Kilgarlin said that if it was held that 71.031 was unconstitutional in relation to personal injuries alone then it would not be necessary to excise the reference to personal injuries from the statute. The words would simply be regarded as referring to a wrongful application of the provision. Mr Kilgarlin did not think that equal treaty rights could be established by reference to a series of treaties. On this point he differed from Professor Baade who considered that Owens-Corning was clear authority for the view that the equal treaty provision could be fulfilled by other than a comprehensive treaty. Mr Kilgarlin thought that a trial judge would hesitate to declare 71.031 unconstitutional and there did not seem to be much dispute as to the fact that the equal treaty point would probably go to the Supreme Court of Texas for effective resolution. Section 71.031 has no severability clause but Mr Kilgarlin thought that the same effect would be secured by the Code Construction Act (123/13 of process) which provides a severability code applicable to the construction of Statutes. Provision 311-032 of the Act is headed "General Severability Clause" and it sets out: "If any provision of the statute or its application to any person or circumstances is held invalid the invalidity does not affect other provisions or applications of the statute which can be given effect to without the invalid provision or application and to this end the provisions of the statute are severable". In relation to the said Code I find it somewhat difficult to follow the argument that severability can be achieved simply by regarding a portion of 71.031 as inapplicable rather than severing it from the statute. The Code refers to "any provision of the statute or its application". Thus there are two distinct concepts "provisions" and "applications". The latter word is only meaningful in the context of a "provision" because a statutory provision is a prerequisite of its application. Therefore the first question is whether the provision itself is constitutional. If the provision is unconstitutional there can be nothing effective to apply. In the phrase "death or personal injury" the reference to death is a provision or part of a provision and its presence in Article 71.031 must be recognised before any question of its application arises. One could envisage a situation where in certain circumstances an application of the provision in relation to personal injuries would be constitutional and other applications unconstitutional. For example if the open courts provisions only applied to certain types of injury the equal treaties provisions may apply to certain types of personal injury claims and not others. Similarly in relation to persons one could have an open court factor that only applies to certain categories of person. In the situation I have been postulating questions could arise as to the constitutionality of a particular application of an otherwise constitutional provision. However the situation in relation to personal injuries, according to the evidence, is that it would be unconstitutional to exclude such claims as arise therefrom in relation to any circumstances or to any class of persons. There could be no question of severing an application since the whole of the provision is in every circumstance unconstitutional.

Thus if anything is unconstitutional it must be the provision that is unconstitutional and not its application. The Code provides for the severance of the provision and not merely that it should be regarded as an unconstitutional application. Of course the question still remains as to whether the reference to "death or personal injury" represents one provision or two separate and independent provision. If there is only one provision then the whole provision must be unconstitutional and it all falls. It certainly reads like one provision rather than two separate and distinct provisions. It should be noted that in Rose the relevant statute itself contained its own severability clause and though similar it is in some respects materially different from that in the Construction Code. Professor Baade explains why in terms of legislative intent it is unlikely that the legislature would provide a separate and distinct measure for death cases. Given the history of the legislation which he describes I agree with him. The rules he gives as dominating the construction of statutes in Texas are (1) the validity of a Texas statute is measured by the Federal and State constitution, (2) the legislative intent is considered and (3) it is presumed that the legislature does not intend to violate the constitution. Two subsidiary rules are (1) every statute should be construed so as to be in compliance with the constitution and (2) if possible the constitutionality of the statute should be saved so far as consonant with legislative intent and partial invalidity should not violate the whole statute. The cardinal rule is always legislative intent. He points out that there is no case where the US Supreme Court has held that only part of a statute is invalid. The question of Equal Treaty rights was not mentioned as a problem by any of the witnesses who were part of the team of lawyers involved in negotiating the settlement and they represented a wide spectrum of experience. So far as we know the matter was not raised in the case of Busse nor the case of Cobb . There was no suggestion that it was raised in any of the American litigations encountered by witnesses such as Mr O'Callaghan or Mr Wilkes or in any of the British disaster cases that have gone to the United States. Even the defenders did not raise the point until a relatively late stage of this case. All that suggests that it is either a relatively ingenious point or a weak point. I have decided that it is the latter. The starting point is that the United Kingdom has for generations allowed American citizens free access to our Courts. Our laws themselves would not permit anything else. Thus if the cases in the present affair had been refused jurisdiction in Texas because Britain has no reciprocal Treaty with the United States the result would be somewhat artificial and indeed unfair. Both Professor Weintraub in his report and Professor Baade think that looking to the reality of the situation the American Courts would be reluctant to endorse such an unfair result, and I can accept this, and that they would find a solution to the issue which superficially arises. The fact is that although there is no comprehensive treaty there is an established recognition between the two countries that they will accord court access to each other's citizens. In such circumstance it might be though that a formal treaty is unnecessary in that it would merely be acknowledging what is already well established in the relationship of the countries concerned. In such a situation a treaty might be thought somewhat a waste of effort since it would be dealing with what is not a problem. Of course a factual situation can change but equally a treaty can be abrogated. The question would

be whether the acknowledged recognition of the rights of access to the respective Courts of the United Kingdom and the United States could be regarded as the equivalent of treaty rights. Professor Baade thought that it could and I think there is force in his argument. However as he says the position is a fortiori of what I have been discussing. There is an impressive batch of treaties covering aspects of access to the judicial processes of the countries concerned. These treaties can be said clearly to acknowledge that access to courts can be regarded as having the status of treaty rights because the treaties would be extraordinary if they were not coupled with general access to the Courts. There is of course the United Nations Convention which puts the matter beyond doubt. It is obvious that this was not entered into specifically to regulate the relationship of America and Britain but rather to secure equal rights in a whole range of countries. If these arguments did not dispose of the problem then I agree with Professor Baade that it would be strongly arguable that the whole of the provision in question is unconstitutional. This may not be such a drastic approach as it may seem at first glance. Holding the provision unconstitutional in relation to personal injuries is on any view fairly destructive of the objectives of the Act and it would be somewhat incongruous if an injured person could sue in Texas but not his representatives should he happen to die. Thus a lawyer reviewing the situation in 1988 and taking account of the state of the case law at that date would be unlikely to have too much faith in basing his attack on jurisdiction on equal treaty rights. In any event, with the ratification by the United States of the UN Convention in fact, scepticism about the equal treaty issue would have been shown to have been justified. It has to be noted that on any view it would appear that any litigation at the instance of the injured claimant Andrew Carroll would not have been affected by the question of equal treaty rights since, in his case at least, it is agreed that 71.031 was unconstitutional. Conclusions on quantum and settlement There is no way the settlement can be viewed other than against a very broad canvas. It would be surprising if an issue that took many months of litigation was straightforward. The Consortium's advisers were confronted with a difficult and possibly very harmful situation and in my view they acted reasonably. They availed themselves of a wide selection of advisers and followed the advice tendered. In the time available it is doubtful if they could have hoped to secure a better range of advisers or to have conducted deeper investigations. Their problem was not only that they had to form views about various aspects of the law but they did not have time to explore all the relevant facts. A pistol was held to their heads by the claimants and if they had made the wrong decision the consequences could have been very costly. Of course as the relevant authorities show the issue is not whether the negotiators acted reasonably but rather whether or not the settlement terms were reasonable. A detailed consideration of the circumstance of this case has convinced me that the settlement arrangements were reasonable. Put at the very lowest I think it was not seriously contested that there was some risk that the plaintiffs could have secured the jurisdiction of the Texas Court, that an eventual award of damages was likely and that the sums awarded would have been somewhere above Scottish values. I have also held that the plaintiffs would have litigated in Texas if the Consortium had not made an offer at least approximate to that which was

on offer. On the other hand I agree that it would be difficult for me to determine a value for the claims that was not either the settlement figures or the levels of Scottish damages. The first task I suppose for OPCAL's negotiators was to ascertain the level of Scottish damages and the figures they worked on for these in my opinion were perfectly reasonable. Then the possible range of Texas awards had to be considered. Again I agree that insofar as it is possible to ascertain practicable figures for these the consortium's negotiators arrived at reasonable estimates. These figures showed that Texas awards were likely to be substantially higher than Scottish levels and indeed this result was what all those with relevant experience expected. It was recognised that the defendants did not have certain claims to jurisdiction so that some discount over Texas values had to be decided upon to account for the prospect of a defence succeeding. Likewise there were certain other matters that could have been raised against the claimants such as Equal Treaty Rights. Thus the consortium had a dilemma. On the one hand there was a limit and any offers below this were likely to result in all or most of the claimants raising proceedings in Texas. What was at stake was the enhanced values of the claims because I think it was accepted that the consortium had little of any chance of avoiding a liability to pay Scottish levels of damages. If the consortium decided to offer such settlement terms as were available then they possibly were acting somewhat generously but at least they had prompt and certain ascertainment of their total liability. On the other hand if they refused to settle they were faced with a series of litigations in Texas. It is difficult to quantify any prospects they had of defeating such actions. However there was as I have held a very strong risk that the Texas actions would have succeeded. If a Texas jury was to award damages I think the possibility of the levels being substantially less that the settlement figures was low. The more significant risk was that the final award would have been substantially higher than settlement levels. Not only would the Consortium have been faced with the risk of having to pay out higher damages but even on the most optimistic scenario they would have required to contest difficult and expensive litigations. In Texas even a successful defendant gets no award of costs. In any event once the litigations were in Texas a settlement at levels below the values actually paid would have been difficult because of the involvement of Texas lawyers and their feeing system. In the whole circumstances the consortium decided to take the prudent course rather than gamble on the much riskier course. The settlement was I think difficult but wise both in the interests of the consortium itself and in respect of claims against the indemnifiers. The negotiators in the limited time available to them may not always have had a correct appreciation of detailed elements in the situation but they knew that looking to the overall picture facts adverse to their position were likely to emerge. Indeed, even beyond the adverse factors I have identified, there was the risk in such a complex scenario that in the course of a very extensive discovery procedure other problems not explored in detail during the proof could have emerged such as vulnerability of some of the Participants to jurisdiction or even alter ego in respect of some of them. Even if the claimants in Texas actions had run into serious difficulty the consortium may well have been faced with further litigation in Scotland or England to recover damages at reduced levels. The defenders of course deny liability to indemnify at

all or in any event at enhanced levels of damages and indeed in respect of the death claims I have held that there is justification for the latter view. On the other hand, were they wrong about this, it has to be noted that they had an obligation to defend OPCAL against claims. They were kept informed of the state of the settlement negotiations but did not themselves offer to take over the defence of Texas proceedings as an alternative to settlement. Thus in my view the settlements represented a reasonable compromise. Of course as I have held the proportion of expenses paid over which were relative to the Cullen Inquiry would not have been recoverable under any of the indemnities even assuming they apply. Moreover in respect of Oxy Gap payments (in this proof the Stena Offshore action involving Andrew Carroll) the defenders should be allowed a deduction for the tax benefits I have discussed above. CHAPTER TWELVE - CONTRIBUTION On day 381 of the proof, in the last day of their submissions in defence, the defenders advanced an argument that six out of the seven actions are irrelevant on the basis that the should properly have been raised in the name of the pursuers' insurers against the defenders for contribution. This submission was not the subject of a special plea in law but was advanced under the defenders' general preliminary plea attacking the relevancy of the pursuers' case. The present proof is of course before answer but it has to be said that the defenders' contentions on this matter came somewhat as a surprise seeing that the case had proceeded for 381 days without there having been a whisper about the question of contribution. That such a fundamental argument should only emerge at the last gasp of such a long proof prima facie does not seem in harmony with a legal system that prides itself on the availability of preliminary procedures for disposing of points that are purely points of law. It has never been disputed that the underwriters and insurers of OPCAL had settled the majority of the claims which are the subject of the proceedings under the indemnities. There was also evidence of the fact that if the pursuers recover under these action then the pursuers' underwriters will have rights of subrogation. As I have already related there was an uninsured layer in the Occidental Group insurance and this has been referred to as the Oxy Gap. In the present seven cases it was only in the Andrew Carroll case (Stena Offshore Ltd) that OPCAL required to make some settlement payments out of their own resources. They paid out in total the sum of £15,330 but as I have already decided their loss on this payment was reduced by tax advantage so that their net loss was £12,685.57. There was some evidence that certain of the Participants may have required to meet small amounts of the settlement payments out of their own resources but since there was no evidence that this occurred in any of the particular cases before me I fortunately do not require to consider any complexities this may generate. Mr Peyton representing the insurers' interests was quite happy to accept that his clients in the present actions were seeking through subrogation rights to recover the monies they had paid out to settle the claims. The defenders maintained (and I do not think it was disputed) that a party can only recover under an indemnity in respect of loss incurred. The essence of the defenders' point was that the pursuers have already been indemnified by the insurers in respect of their loss so that they have no remaining loss. They cannot be compensated twice for the same loss. The loss covered by insurance was the same loss as is now the subject of the

indemnity claims by the same parties as were the beneficiaries under insurance. The defenders submitted that if there are two distinct obligations of indemnity with each indemnifier liable to the same creditor for the same loss, then the liability of the two indemnifiers is joint and several. It was said that it was a general principle of Scots Law that where several persons are liable in solidum to the creditor each is liable only for a proportionate share in a question with his co-obligants. If he has required to pay more than his share then he is entitled to relief from his co-obligants to the extent of their pro rata share. I was referred to a passage in Gloag on Contract 2nd edit. P206 and this certainly puts the position succinctly enough. The learned author states "It is a general principle, dependent on equity , that where several persons are liable for the same debt, each, though he may be liable in solidum to the creditor, is liable only for a proportionate share in a question with his co-debtors, and, if he is forced to pay more, has a right of relief against them. This principle, though it has been chiefly illustrated in questions between co-cautioners and insurance companies who have undertaken the same risk, does not depend on any speciality in the law of cautionary obligations or insurance, but proceeds upon a principle of law which must be applicable to all countries, that where several persons are debtors, all shall be equal'". The quotation at the end of Professor Gloag's said statement is taken from the speech of Lord Redesdale in the case of Stirling v Forrester in the House of Lords. At page 209 Professor Gloag points out that an insurer who pays more than his proportionate share may exercise his right of relief against co-debtors in his own name and without any assignation from the creditor. The next case the defenders referred me to was Moss v Penman 1993 SC 300 , In that case parties borrowed money from a company and executed a bond in which they undertook to pay back the money jointly and severally with interest. The respondent voluntarily paid back the whole money due to the company and sought pro rata relief from the appellant. The appellant had been under no obligation to pay off the debt when he did so. It was held on appeal to the Inner House that the appellant's right was based on recompense and he was entitled to pay off the debt although the payment had not been compelled. The main significance of the case is that it confirms Professor Gloag's view of the law. It would also remove any argument that the insurers in the present case were not forced to pay the claimants. The right of relief does not depend on any action taken by the creditor but on the legal liability of the debtor to pay the debt. When one debtor pays off the debt neither debtor is under any further liability to the creditor. If the paying debtor could not recover the co-debtor's share of liability the latter would benefit from unjust enrichment. The Lord President did not consider that the expression "forced to pay more" in the passage I have read from Gloag was to be taken as meaning "forced by the creditor to pay more" Another implication of Moss is that payment by one debtor extinguishes the debt and I think this must be obvious. A further case the defenders referred me to was The Sickness and Accident Assurance Association Ltd v The General Accident Assurance Corporation Ltd

(1892) 19 R 977. In that case one insurance company after paying to a tramway company in respect of a loss incurred in an accident sued another insurance company for contribution on the ground that they had both insured the same risk. In the case the Inner House held that the pursuer had a title to sue and carefully differentiated between subrogation and an action for relief. Unlike the subrogated party in say an action arising out of a delict the right of relief between co-debtors resides in the co-debtor directly. The opinion in The Sickness and Accident case was referred to with approval in the Federal Appeal Court of Australia (a Court of five judges) in Albion Insurance Company Ltd v Government Insurance Office

(1969) 121 CLR 342 . The case it was said reaffirmed the principle of Scots Law which had been represented to me. It was held that a right to contribution between insurers exists when more than one policy covers the risk that has given rise to the claim, whatever else may be insured by the policies. It was made clear that whereas to insure doubly is lawful the assured cannot recover more than the loss suffered. An attempt was made to suggest that the law of contribution was specific to Marine insurance but this was rejected by the Court. The essential thing is that each insurer must insure against what is essentially the same risk although the insurance need not be identical. The test may be extracted from the judgment of the Court where it states "there is no double insurance unless each insurer is liable under his policy to indemnify the insured in whole or in part against the happening which has given rise to the insured's loss or liability". Mr Justice Kitto who issued a separate judgment steered his view (which generally coincided with that of the Court) away from any dependence on the particularities of marine insurance. He declared that the law of contribution brought together two principles, the first was that persons who are under co-ordinate liabilities to make good the one loss must share the burden pro rata . The second was that a contract of marine insurance is a contract of indemnity so that the indemnified party may not recover more than his actual loss. These principles were accepted both in Law and Equity. It should be noted that Mr Justice Kitto confirms that the payment of one indemnifier discharges the others. Of course he was talking about insurance but then he was dealing with an insurance case and the question is whether there would be any justification in confining the application of the general equitable principles he is discussing to insurance alone. Mr Justice Kitto's opinions which I have been discussing were referred to with approval by Lord Woolf in the Privy Council case of Eagle Star Insurance Company v Provincial Insurance

(1994) 1 AC 130 . In that case which centred on a motor accident there were two policies of insurance covering the vehicle. However both were voidable against the insured but this under the law of the Commonwealth of Bahamas was not sufficient to elide the insurers' statutory liability to third parties. Thus there was statutory indemnity rather than contractual indemnity but his Lordship expressed the view that that made no difference to the question with which he was involved - namely the question of contribution. It was accepted by the defenders that in the case of a delict the wrongdoer is not entitled to the benefit of any insurance cover enjoyed by the victim. In this connection I was referred to

the following English cases, Bradburn v The Great Western Railway Company 10 Exchequer 1, Parry v Cleaver 1970 AC 1 , and The Yasin

(1979) 2 LLR 45. In Scotland it was submitted, correctly I believe, that the law was the same and I was referred to Smoker and the London Fire Authority

(1991) 2 AC 502. The pursuers in reply contended that the defenders had introduced the contribution point at too late a stage of the proof. The matter should have been raised as a preliminary point and perhaps been the subject of a plea of no title to sue or at least a relevancy plea directed at the issue. If the matter had been raised at an early stage of the proof the pushers could at least have considered their position if they had concluded that there was any merit in the point. If the position were that there was some merit in the point (which the pursuers do not actually accept) then if the pursuers now wanted to consider alternative remedies there could be questions of prescription. The defenders should have averred in their pleadings that the pursuers suffered no loss. One problem with that, looking at matters strictly, is that the pursuers do not actually aver in their pleadings that their whole loss apart from the Oxy Gap payments was met by insurers although this emerged very clearly in the course of the evidence. Indeed the pursuers volunteered the evidence themselves at a relatively early stage of the proof. They also made it fairly clear that what they were claiming were the subrogation rights of their insurers. It was submitted that the defenders were well aware that insurers had met the claims. They had during the settlement negotiations communicated with the insurers' representatives. Moreover the defenders had produced before the proof documents disclosing the procedure for settlement with the claimants which in themselves made it clear that it was the insurers of OPCAL and the Participants who were meeting the settlement claims. I think these points are factually accurate. The pursuers referred me to the case of John Lade v The Largs Baking Company

(1863) 2M 17. That was a case about the absence of a no title to sue plea. In the case the action was at the instance of the proprietors of one-half of a property held pro indiviso concluding for a declarator as to the boundaries of the property and for interdict against adjoining proprietors. There was an objection that the pursuers had no title to sue in that other pro indiviso parties had not consented. The case is different to the present one in that in the absence of an attack on title to sue it went to proof rather than proof before answer as in the present case. The point in the case was a true title to sue point in that the pursuers in the absence of other proprietors were not entitled to a remedy. The pursuers in the present case would have been entitled to a remedy if they had proved that they had suffered a loss covered by the indemnities. In Lade it was held that the defenders in going to proof had waived their objection to title to sue. However in a proof it is difficult to see what mechanism there would be for sustaining the defenders' title to sue point in the absence of a plea. Lord Deas said at page 21 "Is it common sense that a party, after litigating for years and joining issue upon a proof upon the merits should have the option, if the proof is in his favour of taking judgement on the merits and if it is against him, of

starting for the first time, a preliminary objection which renders all that has been done useless?" I have great sympathy with the sentiments of Lord Deas but there is a vital distinction between his case and the present cases. The defenders in these cases have not joined proof without reservation but have reserved their right to argue a relevancy question after evidence (and for that matter so have the pursuers). The pursuers submitted that in any event the defenders' arguments on contribution were ill-founded. They suggested that their case had been presented correctly as a case of subrogation. They referred me to Darrell v Tibbits

(1880) 5 QBD 560. The case concerned a lease. The property was damaged. There was insurance and on the other hand a contractual right by the landlord against the tenant whereby the tenant whether he was a wrongdoer or not was obliged to reinstate the property. Thus the landlord passed onto the tenant the obligation to repair the property but had also insured against damage if it was caused by the wrongdoing of a third party. It was held in effect that the landlord had provided double protection for himself. Pursuers' Senior Counsel submitted that this was all his clients had done - procured double protection. The finding in the case (which was decided by the Court of Appeal) as stated in the rubric was that a policy of fire insurance is a contract of indemnity and that upon payment of the amount of loss the insurer is entitled to be put in the place of the assured; and if at a subsequent time the assured receives compensation from other sources for the loss sustained by him the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him. The case does not seem to have been treated as referring to co-debtors for the same loss. The lessee had a contractual duty to repair damage and that was regarded as a different quality of obligation from the insurance which was apparently to indemnify the landlord in the event of fire. The point in the case was that the insurers were liable to indemnify against loss but no loss had been sustained because the tenant had a contractual obligation to repair any damage. Indeed the question of contribution among joint debtors does not seem to have been argued. The pursuers submitted that whole question of contribution between joint indemnifiers only arose in the context of insurance. The indemnities which are the subject of these cases were contracts for services to be provided by the Contractors and are therefore collateral to the main purpose of the contract. It was contended that there is a distinction between the situation where there are two insurance companies standing on an equal footing with each other and a situation where a Contractor has agreed in a contract for services to undertake a particular risk. The parties to the Contract have allocated risk between themselves and the loss in respect of a Contractor's employee under that agreement is to be regarded as the Contractor's loss. If he wants to protect himself further by insurance that is his business. On the question of contribution between insurers, the pursuers referred me to Hardy Ivamy's General Principles of Insurance Law 6th Edit. Page 517. However I did not find the material set out there very useful because it clearly was focused on contribution in contracts of insurance. I was referred to MacGillivray on Insurance Law 8th Edit pages 519 and 761 and the same comment as I made relating to Hardy Ivamy

would apply to what is stated there. I was also referred to a Scottish case on contribution namely The Scottish Amicable Heritable Securities Association and Others v The Northern Assurance Company and Others

(1883) 11 R 302. Lord Maclaren there suggested that the doctrine of contribution only applied to "common insurances of the same interest". However he was dealing with an insurance case and the point was whether certain insurers claiming contribution were in fact insuring the same proprietary interest. It was suggested that the case that comes closest to the problem before me is Parr's Bank Ltd v Albert Mines Syndicate

(1900) 5 Commercial Cases 116. In that case underwriters at Lloyds granted an instrument to a bank in security of a loan made by the bank to a syndicate upon the personal guarantee of two of the directors of the syndicate. Thus in effect the underwriters agreed to guarantee to the bank the repayment of the loan. The syndicate and the sureties defaulted in the repayment of the loan and the underwriters met the repayment. The underwriters then brought an action against the syndicate and sureties and this was by way of subrogation. It was held that the contract of the underwriters was one of insurance and not of suretyship so that they were entitled to sue in the name of the insured. The underwriters and the sureties did not stand in the relationship of co-sureties. The case was decided by Lord Justice Mathew sitting as a single judge. His Lordship took the view that the underwriters were not sureties but rather insurers guaranteeing the solvency of the sureties. In terms of the instrument granted to the bank by the underwriters it was specifically declared that the underwriters' obligation was to arise if there was a balance of the loan left outstanding after the realisation of certain securities deposited and the failure of the guarantors to make good such deficiency. Ignoring whether or not the instrument had been correctly categorised as an insurance rather than a guarantee then it would be inevitable in my view to decide that the sureties and insurers were not co-debtors for the same debt for their obligations were different. The underwriters were not guaranteeing that they would repay the whole loan but simply covering the loss to the bank in the event of the sureties defaulting. They may only have defaulted for part of the loan. His Lordship said that the underwriters were not guarantors but that their contract was essentially one of indemnity which was an undertaking to pay a definite sum on a definite event. Of course in the present case it has to be said that if OPCAL's insurers are indemnifiers then so are the Contractors. The case of Parr's Bank Ltd is not really on all fours. In that case the sureties were obliged to accept responsibility for a predetermined sum of money. The insurers on the other hand had only accepted liability for a loss. In the present case both insurers and Contractors are pledged to cover a loss and in the case of both parties it is the same loss. It can also be said that in that case if the sureties had paid they would have had no claim to contribution from the underwriters because the event that would trigger off the insurance would not have arisen. On the other hand in the present case in the event of claims arising from an accident to the Contractor's employee both the Contractor and OPCAL's insurers had liability to cover OPCAL's loss. At least to that extent on any view they were co-debtors. In my view the principle behind contribution is very succinctly stated by Professor Gloag.

The important factor is that parties should have undertaken the same risk to the same common creditor. However different the genesis of the contracts there can be no doubt that the pursuers' insurers and the Contractor, if they have any obligation to OPCAL and the Participants, have it under contracts of indemnity. No doubt there is a difference regarding the consideration which prompts an indemnity between a case where the indemnity is given because of the payment of a premium and the case where it is granted because of the benefits of a Contract to provide services. An insurance indemnity will have features specific to it like the obligation uberrimae fidei just as a contract for services on an oil rig will have many features which will not be found in a contract of insurance. However it is clear from the authorities that the contracts which give rise to the joint debt need not be identical. The question is whether in relation to the creditors have the debtors obliged themselves for the same debt? Insurance, whatever its special features, is basically an indemnity to cover losses arising from a particular event. Despite the manifold provisions of the Contractor's Contracts we need only focus on the indemnities granted, for the pursuers only present their claims on the basis of these. In the Contracts the Contractor undertakes to make good to the Company any loss occasioned to the Company through death of or injury to one of the Contractor's employees. There are special provisions applying to matters like wilful misconduct but as I have held in relation to the facts of this case the indemnity is applicable. Equally the Company's insurers have pledged themselves to meet the Company's loss in circumstances which include the death of or injury to a Contractor's employee. Although we have not seen the terms of the insurance policies this is the inevitable inference from the fact that they immediately assumed and settled the claims. The Contractors are not insurers but they have, among the various obligations they have assumed, granted an indemnity - that is an undertaking to make good loss in a certain eventuality. It is difficult to see how this differs fundamentally from an insurer's equivalent indemnity. Whatever else is obvious it is that in a case of this kind where no specific provision has been made for double recovery the creditor should not recover twice. Accordingly the insurers who paid out in the first instance should either be able to recover their whole outlay through subrogation or a proportionate part of their outlay through contribution. Obviously they cannot invoke both since they are mutually exclusive. The prerequisite of subrogation is that the creditor should have an enforceable right that can be transferred to the debtor who settles. Now this is what happens in, say, claims under delict. The law there is quite settled. If there is a claim against a wrongdoer for damages arising from delict or, say, for damages arising from breach of contract that wrongdoer has the primary obligation to make reparation. He cannot be relieved of his responsibility by the fact that the victim had decided to cover himself by insurance. Thus if an insurer settles a claim for damages the claim against the original wrongdoer survives because he remains primarily liable to the victim. However the victim cannot recover damages for his own benefit until he compensates his insurers for settling the claim. Thus the principles of subrogation. If a party enjoys the benefit of two or more indemnities granted to him to cover a particular loss then if that loss emerges he can choose to recover from which of the indemnifiers he chooses. If he recovers his whole loss it is difficult to

see upon what principle he retains a right to enforce his indemnity against the non-paying indemnifier. His loss has been satisfied. There is no established principle that I am aware of that would entitle him to enforce his loss from the Contractor as there is in the case of a wrongdoer. Perhaps if the indemnities had been granted to cover only facts occasioned by the indemnifier's own negligence some nice questions would arise but that is not the case here and indeed the indemnity is being invoked in circumstances where no-one suggests that the Contractors have been negligent. The pursuers contend that the service contract has to be regarded as the governing indemnity. I am not quite sure why unless it is because it is connected with a whole lot of quite different obligations. In respect of these actions the pursuers proceed under the indemnity alone and the non-related provisions of the Contracts are irrelevant except perhaps insofar as they assist the construction of the indemnities. I suppose that were terms of the indemnities to declare that they were to be regarded as the primary indemnity obligations, that might raise different issues but that is not the case here. It should be noted that it is feasible that the Company could have indemnities arising out of different Contracts in respect of the same loss. Thus one Contract might give rise to an indemnity claim in respect of injury to a Contractor's employee. However if that injury arose out of the actings of, say, a supplier of another Contractor then the Company would have a claim against that Contractor under the Third Party Injury indemnity. The second indemnifier need not necessarily have been negligent for the indemnity to arise. Under the pursuers' presentation which of the two indemnities is to be regarded as the primary one? Presumably any question between the two Contractors could only be settled on the basis of contribution. I think the questions that arise on the matter under discussion ought to be settled on the basis of principle and not by reference to any rigid classification such as insurance and non-insurance. Initially attempts were made to confine contribution to particular categories of insurance and this was rejected by the Court as artificial. My conclusion therefore is that the Insurers of OPCAL and their Participants do not have any right of subrogation in respect of the indemnities granted by the Contractors. The pursuers no longer have any title or interest to sue the Contractors. This means that if the insurers want to recover their outlay this would have to be by way of a separate action based on contribution. Thus only in respect of the Stena Offshore action is there a relevant claim under the Contractor's indemnity and that to the limited extent of the Oxy Gap payment to the claimant Andrew Carroll less the tax benefit. With regard to the complaint by the pursuers that the contribution question was raised late I can certainly sympathise with their unease. Whatever the technical position it seems to me rather unfair not only to the pursuers but to the Court to keep such a critical preliminary question until the end of a very long proof unless there is some reasonable justification for this. The defenders claim that the pursuers had no averments to the effect that they were insured so that it was only in the course of the proof that they ascertained the pursuers' position in relation to insurance and had to consider its implications. However this explanation raises questions. So far as the evidence goes the defenders appear to have known in 1988 that it was the pursuers' insurers who were governing the settlement. The claims were paid out by the insurers under complex and

widely discussed arrangements so that it would have been rather surprising if the defenders had not known this. There were meetings between the pursuers' representatives and the contractors' representatives at which agents for the parties' respective insurers attended. In any event if they wanted to take the point they now advance they may well have had sufficient material to aver that they believed the pursuers to be insured and that their insurers had settled the claims. I have little doubt that the pursuers would not have disputed this generality about their insurance arrangements. Thier witnesses were perfectly open about introducing them to the case. If the pursuers had denied that they were insured the issue could have been tested by recovery of documents and the position adopted by the pursuers would have been at their peril. Certainly the defenders may not have been familiar with the details of the Oxy Gap but if they had taken a point about insurance it would have been in the interests of the pursuers to raise it themselves. Even supposing that the defenders knew nothing before the proof about the pursuers' insurance arrangements these were made plain in the evidence at a fairly early stage of the proof. Even at that point the defenders could have sought leave to add a specific plea by way of amendment and an adjournment of the proof could have been considered to enable the matter to be debated. It should be noted that the eventual submissions on the point being discussed in this chapter took scarcely a day of a proof which occupied 391 days. It would also, on the face of matters, have been fairer pleading practice to have a specific plea in law to cover such a separate and fundamental point. If a preliminary determination of the contribution point had been along the lines I have been following it is difficult to know just what time would have been saved but this would certainly have been a material amount. Presumably the claims for contribution would have been pressed and these actions may have raised similar questions to this case. The Oxy Gap cases would have had to be decided. However I do not think it is fanciful to suppose that the litigations would have been curtailed and in any event the issues would have been presented in a more appropriate way. A material amount of time was spent looking into the assessment of damages in the individual claims and debating the differences between the indemnities affecting individual cases. However whereas I have expressed my concerns there may be aspects of the position which I have not as yet been addressed on and which may explain why the cases have developed as they have. Clearly however this whole matter will require to be addressed in relation to expenses. In relation to the position as it now stands it has to be observed that the pursuers must accept some responsibility for the position (only assuming of course that my views on the matter are right). The insurance arrangements were obvious to the pursuers and they made the choice to sue under subrogation rather than contribution. If they had concerns about the defenders general preliminary plea they could have insisted on going to procedure roll. I do not think that the late advancement of the contribution point affected their capacity to deal with it as an argument for they had some days to consider it and I would have allowed them more time if asked. I consider that I cannot exclude the defenders' arguments. This is a proof before answer and I must be satisfied that on the basis of the facts proved that the remedies each party seeks are justified in law. Given the eventual state of the evidence

the fact is that the pursuers have not proved that they have a loss to recover under the indemnities (apart form the Stena case). I cannot ignore that fact. To give the pursuers an artificial remedy could simply complicate the tangle. Immediately the question would arise as to whether the paying Contractors would retain a right of contribution against the insurers. One matter that causes me slight concern is that the terms of the insurance policies from which the Company benefited were not before me. This was a matter mentioned by the pursuers. Thus for example it is possible, although I think unlikely, that these policies were not general liability to workmen policies but insurance against the specific risk that the Contractors would not honour their commitment under the indemnities. Were this so different considerations might have arisen. On the other hand the insurance arrangements were not only known to the insurers, said to be the real claimants in these litigations, but were in fact their own policies. They should be readily familiar with the terms of the policies and the circumstances under which they compensated their clients. The defenders first introduced the contribution point on 15 October 1996 at the end of their first speech. However the pursuers spoke for a few days in replication and it was not until 30 October that they addressed the issue of contribution. Thus in these days of modern communication the pursuers certainly had time to discover if the insurance policies had any particularly relevant terms and no doubt if this had been the case they would have brought the situation to my attention. CHAPTER THIRTEEN - CONCLUSIONS Because the Piper Alpha catastrophe was so dreadful and awesome the present litigation has proved to be quite exceptional both with regard to its length and complexity. The families of the many deceased victims and the survivors themselves although not directly concerned in the litigation have a natural interest in finding out as much as they can about the cause of the tragedy. The insurers of OPCAL and the other Participants have paid out vast sums of money in settlement of victims' claims. They now claim that in respect of settlements with Contractors' employees (or the families of such employees) each Contractor should indemnify them in respect of sums paid in settlement of claims regarding that Contractor's workmen. This obligation is said to arise out of the terms of certain indemnities which were incorporated in the Contracts between the platform Operator and the contractors. There are I understand 146 separate actions in the present series of litigations. The particular seven cases before me are to be taken as representative of the other actions and they reflect such differences as there may be in the indemnities in the various cases. The position is therefore that my decision in each of the seven cases before me will affect the result in a substantial number of additional cases. The claims by victims were settled on a basis that took some account of the damages that the victims would have recovered had they raised their actions in Texas. Thus the total value of the claims under the indemnities is very considerable and will be substantially enhanced by the interest that will have become due over the years on any sums awarded. In addition to this other Oil Companies and their contractors and insurers have an obvious interest to discover what they can of the circumstances surrounding such a massive disaster. The foregoing facts no doubt explain why the cases before me resulted in such an exhaustive inquiry into the cause of the accident and other matters. That is not to suggest

that there is a lot of hard evidence about the cause of the accident. Many of the witnesses who might be expected to have critical knowledge of the facts which surrounded the accident are dead and the platform itself rests at the bottom of the sea. Thus the issue in the litigations insofar as concerns the cause of the accident was fundamentally to decide what inferences can be drawn from the few reliable bits of information about the accident that are available. Many of these inferences can only be made after consideration of very difficult and extensive technical evidence. Moreover in deciding the cause of the accident a number of difficult legal questions have arisen and these include the application of res ipsa loquitur, foreseeablity and novus actus interveniens to name but some. There are also substantial questions raised about the application of various aspects of the law of evidence. All such legal questions have been decided by me in the preceding chapters and I do not require to repeat the arguments and their resolution. In this case there is the coincidence that just before the accident OPCAL's Lead Production Operator, Mr Vernon, who was on duty at the time proposed a course of action that was grossly irregular. That is to say he proposed that Condensate Injection Pump A which had been withdrawn from production for maintenance reasons should be brought back into immediate operation. He did this because the other pump, pump B, had tripped and could not be started. There are only two Condensate injection pumps and if both of these are not available for any material time condensate production will be lost. Unfortunately at the time Mr Vernon intimated his intention the Pressure Safety Valve 504 serving the relief line from pump A had been removed for calibration and the open end of the relief line was protected only by a blind flange which had been fitted by the Valve Fitter, Mr Sutton. This had not been pressure tested. In these circumstance it was bad practice to introduce a flow of condensate under pressure to the pump. These particular facts can scarcely be contested. Thus an accident having occurred, there is an immediate tendency to connect the accident with the seriously irregular action which Mr Vernon had been proposing to carry out just about the same time. Accordingly Mr Vernon becomes the prime suspect. The defenders urged me not to be unduly influenced by these facts and to pay careful attention not only to what they claim are difficulties in the Vernon hypotheses but also to other coincidences that may point to responsibility for the accident as resting elsewhere. The defenders are quite right to draw my attention to the risk of assuming too readily that Mr Vernon was the culprit. Assessment of the evidence was anything but easy. The defenders' Counsel sought with skill and much ingenuity to cast doubt on the justification for attributing the cause of the accident to the actings of Mr Vernon. Nevertheless at the end of the day having reviewed the evidence carefully I am led to the view that there is a marked probability that this accident was caused because Mr Vernon proceeded to introduce hydrocarbon to the pump at a time when this should have been avoided - that is to say at a time when PSV 504 was not in place. It was negligent for Mr Vernon to do so even assuming that he was not at that time aware of the fact that he was repressurising a pump when the PSV had been removed from the relief line. As Lead Production Operator he should have taken care to know what was going on within production processes on the platform at any time and not to make mistakes in that regard. Thus Mr Vernon contributed

to the cause of the accident by his negligence. If Mr Vernon caused the accident by jagging the pump it follows also that Mr Sutton was negligent. The repressurising of the pump could only result in an accident if hydrocarbon was able to escape from the pump and on the evidence the most likely source of an escape was an ill-fitting blind flange. Mr Sutton fitted the blind flange and there is an inescapable inference that he failed to fit the flange properly. This immediately suggests his negligence. He was an experienced valve fitter and if he took the appropriate care it should have been well within his capacities to fit the flange securely. The most likely cause of the leak was that he had failed for some reason to tighten the securing bolts in the manner he had been instructed and which he knew to be the correct method. He should have foreseen the risks in not carrying out his work in the proper manner and it was this failure that contributed to the cause of the accident. The obvious risk of not putting the blind flange on securely is that any hydrocarbon that remains in the pump or gets into it accidentally or otherwise will not be contained. This risk continued up to the accident and is precisely what materialised. Thus I have concluded that the accident happened because Mr Vernon and Mr Sutton each contributed to the accident by their respective negligence. I am well aware how unfortunate it is that I have to blame Mr Vernon and Mr Sutton who both were killed by the accident and therefore are not able to explain their actings and possibly exonerate themselves. However I require to determine the case on the basis of the available evidence incomplete as that might be. It of course has to be kept mind that when Mr Sutton failed to tighten the bolts on the blind flange it probably never crossed his mind that he was risking an accident of the scale that occurred. In that respect he was particularly unfortunate but every employee working on an offshore platform should know that on such a work location where great amounts of hydrocarbon are contained under pressure every departure from the strict safety procedures can have serious consequences. I suspect that Mr Vernon as a Lead Production Operator in respect of his contribution to what occurred would have been more acutely aware of the risk of using a Condensate Injection Pump with only a temporary blind flange securing the open relief line. However I have held for reasons which I have explained at length that at the particular time when he repressurised the pump Mr Vernon did not know that PSV 504 was not in place. Thus the accident was caused by negligence on the part of both Mr Vernon and the Score employee Mr Sutton. In these circumstances OPCAL and the Participants had no option but to settle the claims of the victims provided that they could settle on reasonable terms. As I have explained the settlement terms were reasonable. If there had been no settlement the victims would undoubtedly have pursued their claims in Texas. Damages awarded in reparation actions in Texas are generally pitched at a much higher level than what would be expected from a British Court. On occasion they can even reach levels that a defenders' reparation lawyer in Scotland would consider to be distinctly alarming. OPCAL and the Participants therefore settled at levels that they considered to be a realistic compromise between Scottish and Texas levels. They settled on what has come to be known as a Mid-Atlantic basis. The defenders challenged the basis of the settlement and their main ground for doing so was that the settlement terms were too high because they did not properly reflect

the difficulties claimants would have had in persuading a Texas Court to accept jurisdiction. OPCAL had all along supposed that a Texas Court would accept jurisdiction. They considered in particular that given the extensive activities of the Occidental Group in Texas grounds would exist for establishing jurisdiction in that State. The defenders also contended that the levels of damages offered by the pursuers had been too high taking account of all the risks that the claimants would have faced in attempting to establish their claims in Texas. The issues which consequently emerged resulted in an extensive exploration of the laws of jurisdiction applicable to Texas, American Court procedures, the principle of Equal Treaty Rights, and the likely levels of Texas jury awards. These matters were anything but free from difficulty however interesting they may have been. In the result though I found that OPCAL had arrangements for selling their North Sea oil based in Texas and that above all made me decide that there was a very real risk that actions by Piper Alpha claimants taken to Texas would have been entertained by the State Courts there. The prospect of avoiding such a result by the available Appeal procedures would have generated much cost and delay and in any event would have been at best very uncertain. The determination of a reasonable level of damages to base settlements on were in my view achieved on a sensible basis which took account of the very definite risks of high awards. Thus on the whole the settlements in my view represented as reasonable a disposal of the claims as could be achieved. One exception to this was certain expenses paid to the legal representatives of the victims so that they could be present at the Cullen Inquiry. I have explained that these expenses were probably at least partly based on public relations considerations rather than legal obligation. Thus that element of the settlement would have had to be excluded had I been minded to find the defenders otherwise liable under the indemnities. It has to be mentioned that the payments made to claimants were made by the insurers and underwriters of OPCAL and the Participants. This means that apart from claims that fell within what was known as the OXY Gap the pursuers have not to date suffered any loss. The OXY Gap represents a gap in the very complex insurance arrangements which OPCAL enjoyed. The result is that OPCAL had to pay claims that fell within that gap from their own resources. In the case of OXY Gap payments OPCAL suffered a real loss and this enabled them to set off that loss against certain taxes and impositions that otherwise would have been payable by them. I think this would mean that if OPCAL recovered their Gap outlay under the indemnities they would secure a net benefit. Under the present Tax regime some of their tax benefit would have to be accounted for and repaid as current tax but this would not be as much as had been their original benefit. I consider that this factor must be considered as diminishing their loss so that recoveries under the indemnities in respect of Gap payments must be reduced to reflect the tax saving. No question of the receipt of tax benefits arises where the loss was met by third parties such as insurers. The construction and application of the indemnities contained in the Contracts between the parties provoked a lot of debate and were hotly contested. Where a question of negligence arose the defenders argued that the indemnities did not cover situations other than where there was contributory negligence between the parties themselves. I came to consider that these indemnities have

unambiguous meaning although I think they could have been drafted so as to mean more obviously what on considerable analysis I think they must mean. In particular I concluded that the indemnities would be enforceable even if OPCAL had contributed to the accident by their negligence provided that another party (which would include a third party) had also contributed by negligence to the accident. Thus I took "sole negligence" and "contributory negligence" to be the opposites of one another. On this basis the indemnities would cover the situation where as here the death or injury of the Contractor's employee was caused by the joint negligence of Mr Vernon and Mr Sutton. The defenders contended that in the circumstance of the case the exceptions in the indemnities relating to "sole negligence" and "wilful misconduct" would apply. I was unable to agree with these submissions. Given my views on the contractual meaning of contributory negligence then sole negligence cannot be applied. The matter of wilful misconduct was also raised. If Mr Vernon had pressurised the pump knowing that the PSV was not in place that would have been a deliberate breach of the safety procedures and I would have found wilful misconduct established. However for the reasons that I have earlier explained at length I consider that at the time he repressurised the pump either Mr Vernon had never known the situation in relation to the PSV or, if he had at one time known it, this had slipped his mind. I was also asked to find that the senior management of the Company were so neglectful of safety matters that the accident could be regarded as an act of wilful misconduct on their part. As I have already explained it was clear to me that OPCAL devoted a considerable amount of money and effort to safety matters. However whatever the prospective efficiency of the safety procedures they had in place, their arrangements for monitoring and auditing the implementation of these procedures left much to be desired. Be that as it may it was not clear to me how the accident could be shown to have been due to deliberate departures for the permit to work procedures or the handover procedures. Partly this is because the series of events leading up to Mr Vernon' actions on the night of the accident cannot be known in their detail. Certainly I cannot conclude that general slackness in the enforcement of safety procedures had anything to do with Mr Vernon's decision to bring pump A into use. One further matter of importance concerns indirect and consequential loss. In the Contracts covered by these seven actions, other than the Contract between OPCAL and Stena Offshore Ltd, there are contractual provisions which in my view exclude the recovery under the indemnities of indirect and consequential loss. This was an area of the case not without considerable difficulty but I concluded that the implication of OPCAL's sales arrangements in Texas (which were critical on the question of Texas jurisdiction but would not be known to the Contractors when they entered into the Contracts) meant that the Texas enhancement of the damages paid on settlement would not be recoverable under the indemnities because they were specifically excluded from the indemnities as indirect and consequential loss. Essentially the Contractors had not been informed of the important fact that OPCAL were carrying on an important part of their business through Texas. The Stena Offshore case is distinguishable because the specific exclusion of loss is in different terms. Thus were I awarding the pursuers decree for recovery under the indemnities in the six other actions I

would do so on the basis that the recoverable loss must be based on Scottish levels of damages. These levels are known and indeed were agreed by the parties. The defenders advanced a number of other legal points such as the competency of persuading a Scottish Court to assess foreign levels of damages and the impact of the "friendly actions" which were part of the settlement scheme on the level of recoverable loss but I was unable to sustain their submissions. If the pursuers had suffered the losses such as I have indicated would be recoverable under the indemnities then I should have granted them decree against each of the defenders subject to restriction in respect of the Lord Cullen Inquiry expenses, the reduction to Scottish levels of damages in all but the Stena Offshore action, and the reduction for net taxation benefit in that action. However at the very end of their submissions the defenders raised the issue of contribution. Their point was that excepting such parts of the settlements as were OXY Gap payments, the pursuers had not in fact suffered any loss. The settlement amounts had not been paid by OPCAL and the Participants but by insurers who had agreed to indemnify them in respect of the claims which arose against them. These insurers had fulfilled their obligations of indemnity and therefore both OPCAL and the participants had suffered no loss. The pursuers now sought to impose the whole of the loss represented by the claims on the Contractor indemnifiers. The insurers who paid out at the settlement and the Contractors were both in effect indemnifying the same loss. That being so there was no warrant in law for expecting one of the indemnifiers to carry the whole loss. The present action is irrelevant because the pursuers have not suffered loss. The proceedings that should have been raised to regulate the indemnity position were actions for contribution at the instance of the insuring indemnifiers who paid out at the settlements and they should have been directed against the Contractors for contribution. This would have course been a reduced claim since it would have only been for a 50% contribution to the losses covered by the indemnities. Moreover in respect of Texas levels of damages the Texan element may not have been recoverable at all if the Contractual indemnities do not cover such loss. I have decided that this in fact is the position. The amounts claimed by the pursuers in respect of expenses paid under the settlements were also paid by their insurers so that once again no loss has been sustained and any remedy should be by the insurers against the co-indemnifiers for Contribution. My conclusions mean that because of the contribution point I shall sustain the third plea-in-law for each of the actions except the Stena Offshore action and assoilzie the defenders in these actions. The basis of this result is that the pursuers have failed to prove losses which would in law entitle them to recover the sums sued for under the indemnities. In the case of the action against Stena Offshore the pursuers are entitled to recover the OXY Gap loss that they sustained in respect of the injury to Andrew Carroll less the deductible tax. Otherwise the action cannot succeed because the pursuers have suffered only the limited loss I have referred to. The amount in question is £12,685.57 and I shall award the pursuers decree against the defenders for that amount. Thus I shall sustain the pursuers' first plea-in-law but only to the extent that the defenders are bound to indemnify the pursuers for £12,685.57. As I have observed earlier it rather concerns me that after a proof of inordinate length (over four years) six of the seven test actions have

been decided by what very much appears to be a preliminary point. It is difficult to point a finger of blame since there may have been considerations which have not as yet, or perhaps cannot, be brought to my attention. Nevertheless the defenders may want to deal with this matter when expenses are discussed. There was also a mass of mathematical evidence which at the end of the day does not appear to have been disputed. There may of course have been practical problems preventing agreement. Overall this case represents a striking example of the benefits which Rules of Court which permitted a structured system of case management might bring to appropriate cases. The proof could have been split up into more convenient and sensible sections. Moreover the problem of Contribution, if it was going to be raised at all, could have been identified and decided at an earlier stage. It must be noted that not all of the time spent on these cases was necessarily wasted. Certainly with only one defender a substantial amount of time could have been saved and generally the litigation would have been on a different scale. It has also to be noted that the amount I have awarded in the Stena action does not properly reflect the value of that litigation. It is a leading case and only one of the OXY Gap cases that will have to be resolved. The total amount of the OXY Gap is over US $19 million and there will be considerable interest accumulating over the years to add to that. Thus the decision in the Stena case could well be very important. Moreover if the actions had properly been actions for contribution, although the amounts claimed would have been smaller, many of the issues which have arisen in these cases may still have required resolution and the parties although different in title would generally have represented the same interests. Nevertheless with a litigation of this significance it is important that it should be properly structured. Despite my concerns about the contribution point (which in any event perhaps can be explained away) in a litigation as long and complicated as this I think that it is appropriate that I should express my gratitude to all the Counsel who conducted the case. They all showed great skill and commitment throughout and also patience in struggling with a mass of highly technical material. Without help of that quality it would have been very difficult for me to conduct the case. OPINION OF LORD CAPLAN in the cause ELF CALEDONIA LTD Pursuers; against

1. LONDON BRIDGE ENGINEERING LTD
2. NORTHERN INDUSTRIAL & MARINE SERVICES CO LTD
3. BRITISH TELECOMMUNICATIONS PLC
4. WOOD GROUP ENGINEERING CONTRACTORS LTD
5. EASTMAN CHRISTENSEN LTD
6. KELVIN INTERNATIONAL SERVICES LTD
7. STENA OFFSHORE LTD Defenders:

Act: MacAulay QC, Batchelor, Hofford Paull & Williamsons Alt: Currie QC, Keen QC, Wolffe Simpsons & Marwick, W. S. 2 September 1997 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/scot/cases/ScotCS/1997/Pipervol6.html

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